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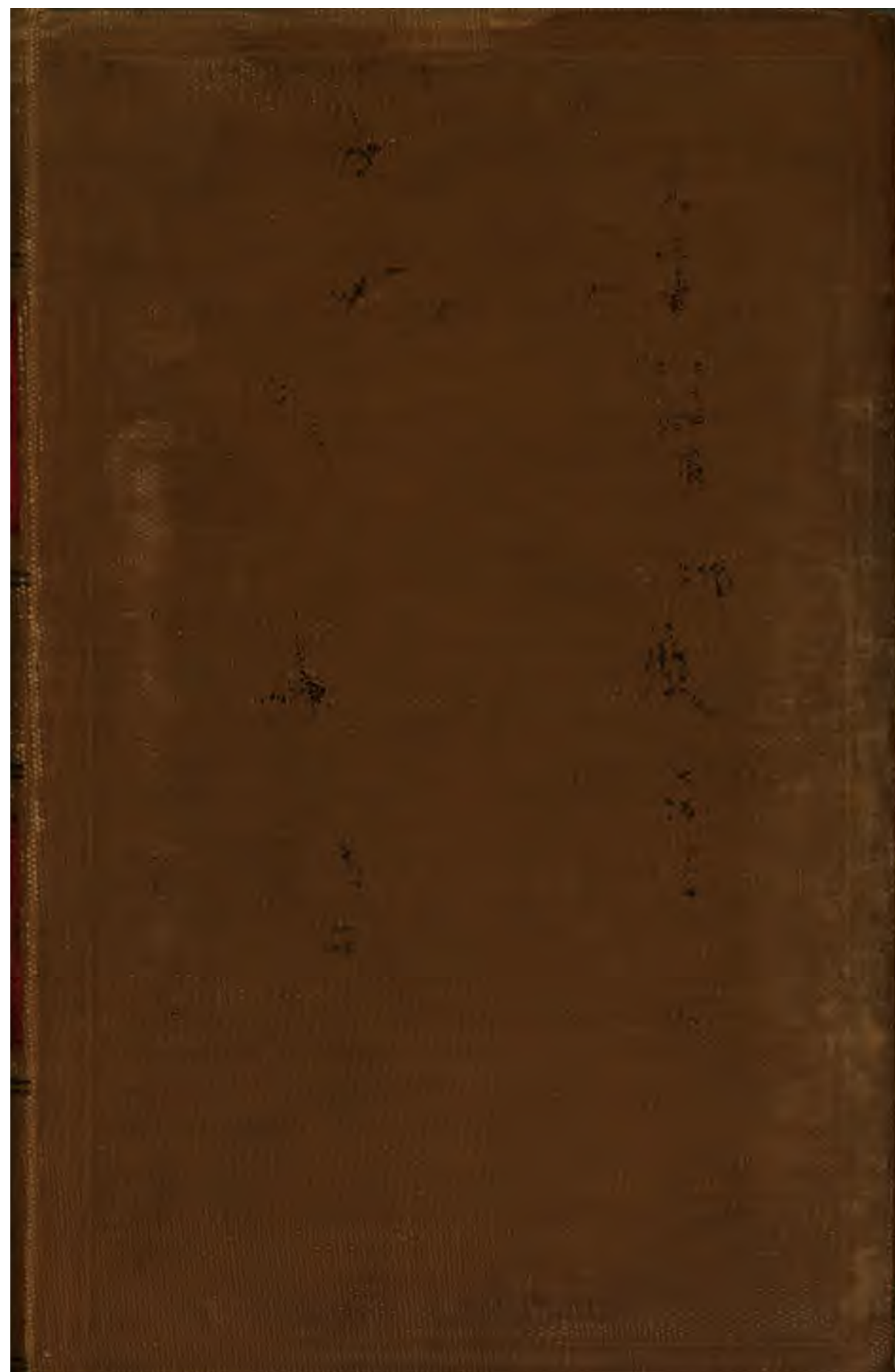
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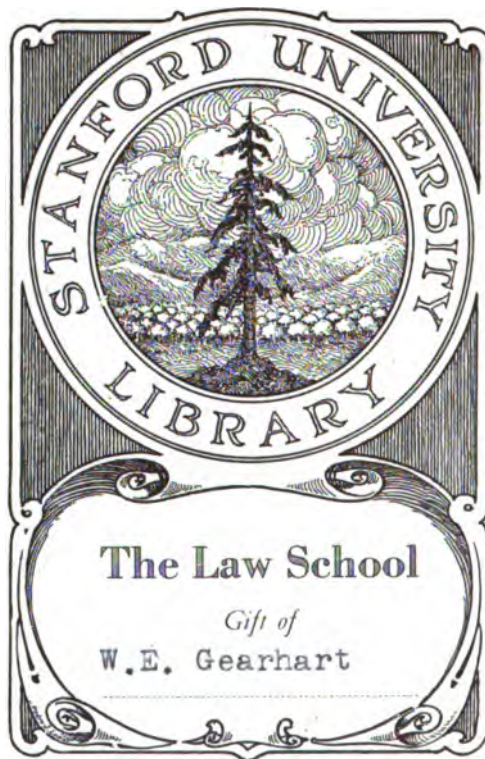
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A TREATISE
ON THE
LAW OF PARTNERSHIP

BY
WALTER A. SHUMAKER

SECOND EDITION

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PREFACE TO FIRST EDITION.

The important position which the contract of partnership has held for more than a century in the commercial affairs of England and the United States has been such that the law bearing on it has been subjected to extensive judicial investigation, and after undergoing many changes, is at the present time well settled in most of its phases. This fact appears to justify the seeming presumption of entering on a field of jurisprudence embraced by the works of such eminent writers as Lord Lindley and Theophilus Parsons. What was impossible during the formative period in which they wrote now seems practicable,—the presentation of a complete analysis in general propositions of the law of partnership; in other words, a substantial codification based not on legislative enactment, but on the consensus of judicial decision. Such a presentation, invaluable to the student, and nearly as much so to the practitioner, has been the aim in formulating the black letter paragraphs in the present work. In the text, the general statement of the law is elaborated, and its history and growth outlined.

The scope and theory of the work render alike unnecessary and impracticable, a complete digest of the cases. The leading cases illustrating the growth of the law are fully cited; on all novel or disputed propositions the authorities have been exhaustively collated, and on well settled rules sufficient cases are cited to thoroughly establish and illustrate the doctrine, including all the late cases of importance. This has required an examination of authorities greater than would be de-

manded by any other plan of presentation. The aim in both text and citations has been to make a book for all the states, and any apparent predominance of citations from certain states will be found due to the prominent part played by such states in establishing the commercial law of the United States.

Considerable work on this manual has been done by another, but all such I have subjected to rigid scrutiny and revision.

W. A. S.

PREFACE TO SECOND EDITION.

In view of the general approval with which the first edition was received, the preparation of the second has involved little besides the presentation of the result of the recent decisions. Every decision on the subject since the first edition was issued has been examined, and not only all that present novel applications of the law, but all that bear on unsettled questions, have been added. Moreover a considerable number of cumulative decisions, selected with special reference to their exhaustiveness of discussion, have been inserted. Few changes in the text have been found needful, but such as might clarify the statement and better present the results of recent holdings have been made.

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PARTNERSHIP DEFINED.

1. Partnership is the relation subsisting between two or more persons who have contracted together to share, as common owners, the profits of a business carried on by all or any of them on behalf of all of them.

Most of the definitions of a partnership to be found in the books, a few of which are set out below in the notes,¹ are fairly open to the criticism that they either omit entirely, or fail to give prominence to, the qualification that the profits must be shared between the contracting parties as common

¹ Various definitions of partnership:

"Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them." Civ. Code, N. Y., § 1283; Civ. Code, Cal., § 2395; Comp. Laws Dak. 1887, § 4027; Rev. Code, N. D., § 4370.

"Partnership is the relation which subsists between persons who have agreed to combine their property, labor, or skill in some business, and to share the profits thereof between them." Indian Contract Act, 239.

By the English partnership act of 1890 (53 & 54 Vict. c. 39), which went into effect January 1, 1891, "partnership" has been defined as "the relation which subsists between persons carrying on a business in common, with a view to profit." Business, within the meaning of the act, includes every trade, occupation, or profession. The act expressly excludes from its operation joint-stock companies, cost-book mining companies, and many others which differ from ordinary partnerships in many particulars. This statutory definition, taken in connection with the other sections of the act, is now, in England, the ultimate test applicable to the determination of the question whether, in any particular case, a partnership does or does not exist.

"Partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." 3 Kent, Comm. 33. Followed in *Waggoner v. First Nat. Bank*, 43 Neb. 84, 61 N. W. 112. A partnership is the relation created by a contract between two or more per-

owners thereof, and not merely because a portion of them is due to a party as a debt. As will be seen hereafter, this common ownership of the profits is the decisive test of the existence of a partnership.² This objection has been avoided by defining a partnership as the contract relation subsisting between persons who have combined their property, labor, or skill in an enterprise or business as principals, for the purpose of joint profit.³ But this definition has, in turn, been criticised as giving a synonym, rather than a definition, as mutual agency results from partnership, rather than partnership from mutual agency.⁴ This matter will be more fully considered in a succeeding section of this work.⁵

A partnership is often called a contract, but this is inaccurate. It is the relation or status resulting from a contract, just as marriage is a status, and not a contract.⁶ It should

sons to place their money, effects, labor, or skill, or some or all of them, in lawful commerce, and divide the profits between them. In *re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383.

These definitions certainly justify the statement made in *Meehan v. Valentine*, 145 U. S. 611, *Burdick's Cases*, 80, *Mechem's Cases*, 103, that "the various definitions of a partnership have been approximate, rather than exhaustive." While it is true that a partnership is all it is said to be in the above definitions, something more is necessary to define it, for all the conditions named might be present, and still no partnership exist, as in the case of a servant or agent sharing in the profits as compensation, in lieu of salary. The qualification needed is that the sharing must be by reason of a common ownership in the profits.

² See *infra*, § 10, "Modern Doctrine," and *infra*, §§ 14, 15, "What Must be Intended—Common Ownership of Profits."

³ 1 *Bates, Partn.*, p. 1. "A partnership is a voluntary, unincorporated association of individuals standing in the relation of principals for carrying out a joint operation or undertaking for the purpose of joint profit." *Dixon, Partn.* 1. See, also, *Cox v. Hickman*, 8 H. L. Cas. 268, and *Eastman v. Clark*, 53 N. H. 276.

⁴ *Pooley v. Driver*, 5 Ch. Div. 471 et seq.; *Meehan v. Valentine*, 145 U. S. 611.

⁵ See *post*, § 121, "Mutual Agency as a Test."

⁶ In this respect, the definition of a contract given in 3 *Kent*,

also be noted that the word "partnership" denotes a combination of persons, and not merely a combination of capital.⁷

So unsatisfactory have been the many definitions of a "partnership," that one classic writer upon the subject, without attempting to define the term, contents himself with pointing out the leading ideas involved in the term,⁸ and this is, perhaps, after all, the best method of conveying correct ideas upon the subject.

ESSENTIAL ELEMENTS.

2. The essential elements of every true partnership are
 - (a) A contract between the partners, and
 - (b) A sharing of profits.

SAME—CONTRACT BETWEEN PARTNERS.

3. A true partnership is always formed by virtue of a contract between all the partners, and never by operation of law.

A partnership only exists between persons who have contracted together for those things which the law has declared to constitute a partnership. In the absence of such an agreement, a partnership is never formed by operation of law.⁹

Comm. 23, and quoted in a preceding note of this chapter, is inaccurate.

⁷ In this respect, the definition of a partnership given in Pars. Partn. c. 2, § 1, as the combination by two or more persons of capital, etc., has been criticised as inaccurate. See 1 Lindl. Partn. p. 3, note 1.

⁸ Lindl. Partn. (15th ed.) p. 1.

⁹ *Wilson's Ex'rs v. Cobb's Ex'rs*, 28 N. J. Eq. 177; *Phillips v. Phillips*, 49 Ill. 437; *Bushnell v. Consolidated Ice Mach. Co.*, 138 Ill. 67, 27 N. E. 596; *Metcalf v. Redmon*, 43 Ill. 264; *Bishop v. Georgeson*, 60 Ill. 484; *Freeman v. Bloomfield*, 43 Mo. 391; *Ingals v. Ferguson*, 59 Mo. App. 306; *Hedge's Appeal*, 63 Pa. 273; *In re Gibb's Estate*,

Thus, no partnership exists between a father and his son, who works for him without salary, and without any agreement between them.¹⁰ So, a husband and wife are not partners, though they purchase property jointly.¹¹ The joint prosecution of a lawsuit does not create a partnership between the parties as to the subject-matter in dispute, in the absence of an agreement to that effect,¹² nor does it create a partnership between the attorneys of a party.^{12a} A person cannot be made a partner against his will, by accident, or the conduct of others.¹³

Agreements not Concluded.

Since a partnership results only from a contract between the parties, it follows that there is no partnership unless all the parties have mutually assented to the same terms, for in the absence of such mutual assent, there is no contract.¹⁴

157 Pa. 59, 70, 27 Atl. 383. But compare *Goddard v. Hodges*, 1 Crompt. & M. 33. Partnerships by estoppel are no exceptions to this rule, for, as will be seen, such are not real partnerships inter se, but individuals are merely held liable to third persons for each other's acts as though they were partners. See *infra*, § 35.

¹⁰ *Phillips v. Phillips*, 49 Ill. 437.

¹¹ *Ingals v. Ferguson*, 59 Mo. App. 299, 306.

¹² *Wilson's Ex'rs v. Cobb's Ex'rs*, 28 N. J. Eq. 177. Where a man and women living with him as his wife jointly accumulate property, after his death such woman cannot claim the property as surviving partner, to the exclusion of the real wife's claim by inheritance. *Estate of Winters*, Myr. Prob. (Cal.) 131.

^{12a} *Willis v. Crawford*, 38 Or. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904.

¹³ *Freeman v. Bloomfield*, 43 Mo. 391. The creditors of a partner who take his interest by assignment or on execution cannot be involved, against their consent, in the responsibilities of a partnership. They are entitled to take it without the risk and burden of being partners. *Marquand v. New York Mfg. Co.*, 17 Johns. (N. Y.) 525.

¹⁴ "In negotiations for a partnership, the parties deal as strangers, for there is no confidential relation existing between them until the

4. Delectus Personarum.—The contract creating the partnership must have been entered into by all the partners.
5. No person can be introduced as a partner without the consent of all those who, for the time being, are members of the firm, except in the case of—

Exceptions—

- (a) Mining partnerships, and
- (b) Joint-stock companies.

It is a well-established principle that a partnership can exist only by the voluntary contract of all the persons who are partners.¹⁵ One partner cannot, without the consent of the other partners, introduce a third person as partner into the

partnership is actually formed." *Uhler v. Semple*, 20 N. J. Eq. 288. See, also, *Metcalf v. Redmon*, 43 Ill. 264. Persons who have agreed to become partners, and have acted as such, will be held to be partners *inter se*, though they may not have understood the conditions of the agreement alike. *Cook v. Carpenter*, 34 Vt. 121.

¹⁵ *Channel v. Fassitt*, 16 Ohio, 166; *Burnett v. Snyder*, 76 N. Y. 344; *Elderkin v. Winne*, 1 Chand. (Wis.) 27; *Kingman v. Spurr*, 7 Pick. (Mass.) 235; *Central City Bank v. Walker*, 66 N. Y. 431; *Hayward v. Barron* (Com. Pl.), 19 N. Y. Supp. 384. See, also, post, §§ 6, 7, "Sub-Partnerships." "To form a partnership, as least so far as the parties themselves are concerned, the assent of both the contracting parties is required." *Bennett v. Pulliam*, 3 Ill. App. 185, 190, holding that an unaccepted proposition of one party is insufficient. Where, by an article of agreement, two persons agree to carry on a trade or business of a particular nature, and in the same instrument a third party joins with one of the other parties to carry on another trade or business for their separate account, the relation of partners is not created between the three, so as to enable a person dealing with either branch of the concern to maintain an action against the whole. *Elderkin v. Winne*, 1 Chand. (Wis.) 27. Where stock in a joint-stock company is subscribed and paid for by one person in the name of another, who does not know of or consent to it, and has not ratified it, the latter is not liable, but the former is. *Wehrman v. McFarlan*, 9 Ohio Dec. 400.

concern.¹⁶ The consent to receive a new member as a partner must be unanimous. A majority of the partners can not introduce a new member, against the will of any partner.¹⁷

The relations existing between partners are of such an intimate and confidential nature, and mutual trust and confidence is so essential to the successful prosecution of the partnership business, that no one can be made the partner of another without or against his consent.¹⁸ This principle is called "*delectus personarum*," and is said to be one of the fundamental principles of partnership law. The important conse-

¹⁶ *Murray v. Bogert*, 14 Johns. (N. Y.) 318. Every member must assent to be a partner of all the others. *Gray v. Gibson*, 6 Mich. 300. Two of five members of a copartnership, in their individual capacity, entered into an agreement with defendant C. B. S., in which it was stated that it was for the interest of said firm that C. B. S. should have an interest, and become a copartner; therefore it was agreed that he "is a copartner in the firm," and that he shall be entitled to receive from the other parties to the agreement one-third of the profits earned and received by each; he agreeing to pay one-third of any losses sustained by either "by reason of their connection as copartners, or otherwise, with the firm." In an action by a creditor of the firm, in which it was sought to charge C. B. S. as a partner, it was held that the agreement did not constitute him a partner, as all the partners had not joined or concurred therein. *Burnett v. Snyder*, 76 N. Y. 344. One partner cannot, without the consent of the other, introduce a stranger into the firm, nor can he, without such consent, make the other partner a member of another firm; but such consent may be implied from the acquiescence and acts of the parties; and if such other partner is made acquainted with the facts, he ought to dissent from the arrangement; otherwise he will be bound by it. *Mason v. Connell*, 1 Whart. (Pa.) 381. One member of a partnership cannot make such a contract as will involve the creation of another partnership between his own firm and other parties, so as to bind thereby his copartners, unless he has other authority than that which is incident to the mere relation of partners. *Buckingham v. Hanna*, 20 Ind. 110. See, to the same effect, *Love v. Payne*, 73 Ind. 80, and *Tabb v. Gist*, 1 Brock. 33, Fed. Cas. No. 13,719.

¹⁷ *Meaher v. Cox*, 37 Ala. 201.

¹⁸ As to partnerships as to third persons by estoppel or holding out, see post, §§ 35-37.

quence of this principle is that the transfer by one partner of his interest in the firm does not constitute his transferee a partner with the remaining members unless they consent thereto.¹⁹

As will be seen hereafter, any change in the membership of the firm will ordinarily operate as a dissolution;²⁰ and even where the remaining partners consent to the introduction of a new member, the old firm will ordinarily be considered as dissolved, and a new one instituted from the date of such change in the membership.²¹ Of course, consent to the transfer of a partner's interest, and the reception of the transferee into the firm, may be given in advance,²² and it is not unusual to insert such a stipulation once for all in the original partnership articles, at least so far as the personal representatives of a deceased partner are concerned.²³ A subsequent ratifica-

¹⁹ *Merrick v. Brainard*, 38 Barb. (N. Y.) 574; *McGlensey v. Cox*, 1 Phila. (Pa.) 387; *Mason v. Connell*, 1 Whart. (Pa.) 381; *Meaher v. Cox*, 37 Ala. 201; *Jones v. Scott*, 2 Ala. 58, 65; *Love v. Payne*, 73 Ind. 80, 38 Am. Rep. 111; *Taylor v. Penny*, 5 La. Ann. 7; *Jones v. O'Farrel*, 1 Nev. 354; *Fay v. Waldron* (Sup.), 3 N. Y. Supp. 894; *McCall v. Moss*, 112 Ill. 493; *Cochran v. Perry*, 8 Watts & S. (Pa.) 262; *Horton's Appeal*, 13 Pa. 67. Where a partnership, for the purpose of running stage coaches, issued to its members certificates of their shares in the joint stock, containing a provision that the shares should not be transferred without the consent of the directors and treasurer, and the plaintiff, to whom a share had been assigned, without such consent, brought a bill in equity to compel the company to account, alleging himself to be a partner, it was held that he was not a partner, and that the bill could not be sustained. *Kingman v. Spurr*, 7 Pick. (Mass.) 235.

²⁰ See post, § 143. See, also, cases cited in preceding note.

²¹ See post, § 143. As a consequence of the rule in the text, an incoming partner is not liable for the debts of the firm incurred before he was admitted, unless he expressly assumes them. *Christy v. Still*, 131 Pa. 492, 19 Atl. 295, 297. See, also, post, § 117.

²² *Fox v. Clifton*, 9 Bing. 119; *Mayhew's Case*, 5 De Gex, M. & G. 837.

²³ *Alvord v. Smith*, 5 Pick. (Mass.) 232; *Lindl. Partn.* p. 433. The

tion is equivalent to a prior consent.²⁴ Consent may be implied from a continued recognition of the new member as a partner without objection.²⁵

right to introduce a stranger into the firm will not be implied from a stipulation in the partnership articles, reserving to the copartners the first option to purchase a partner's share in case he desires to sell. *McGlensey v. Cox*, 1 Phila. (Pa.) 387.

Where articles of partnership contain power for one partner to nominate and introduce into the firm a person for the whole or any part of his share in the business and the profits thereof, that is a consent by the other partners to admit into the partnership any person who is willing to be introduced into the firm and to observe the conditions of his admission; and the nominee, on accepting his nomination, becomes in the eye of the courts a partner, and entitled as against the other partners to such relief as courts of equity are in the habit of granting to persons who stand in the relationship of partners to others. *Byrne v. Reid* (1902), 71 L. J. Ch. Div. 830.

"But it is unlikely that such a result would be reached in the United States. The English doctrine of continuing partnerships is here generally repudiated. *Burdick*, Partn. 330. In the words of one of our courts: 'There can be no such thing as indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership. . . . Even where the partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day; the only consequence being that he thereby subjects himself to a claim for damages for breach of his covenant.' *Skinner v. Dayton* (1822), 19 Johns. 513, at p. 538, approved and applied. *Solomen v. Kirkwood* (1884), 55 Mich. 256." 3 Columbia L. R. 109.

²⁴ *Mason v. Connell*, 1 Whart. (Pa.) 381; *Meaher v. Cox*, 37 Ala. 201; *Buckingham v. Hanna*, 20 Ind. 110; *Love v. Payne*, 73 Ind. 80.

²⁵ *Meaher v. Cox*, 37 Ala. 201; *Mason v. Connell*, 1 Whart. (Pa.) 381; *Wood v. Connell*, 2 Whart (Pa.) 542; *Rosenstiel v. Gray*, 112 Ill. 282; *Tabb v. Gist*, 1 Brock. 33, Fed. Cas. No. 13,719. But one need not notify the world that he does not assent to being a partner with the transferee, in order to escape liability for the latter's acts. *Jones v. O'Farrel*, 1 Nev. 354. New members cannot be introduced into an existing partnership, even by a majority of the partners, without the consent of the others; yet, if the others recognize and treat the new members as partners, and continue the business with them under the original articles this is sufficient to make them partners, and to render the original articles operative as between them. *Meaher v. Cox*, 37 Ala. 201.

Exceptions to Rule—Mining Partnerships.

In "mining partnerships," so called, there is no *delectus personarum*, but the share of any partner may be freely transferred by death or assignment, without the consent of the co-partners, and without working a dissolution.²⁶ For this reason mining partnerships have been said not to be true partnerships,²⁷ but rather a cross between tenancies in common and partnerships proper.²⁸ A "mining partnership," in this sense of the term, exists between the tenants in common of a mine, who work it together and divide the profits in proportion to their several interests.²⁹ Of course, if the parties so intend, they may form an ordinary partnership for the purpose of carrying on mining by entering into an appropriate contract to that effect. In such a case, there will, of course, be a *delectus personarum*. But such a partnership must be created by a special agreement, and will not result merely from the

²⁶ Kahn v. Smelting Co., 102 U. S. 641; Bissell v. Foss, 114 U. S. 252; Kimberly v. Arms, 129 U. S. 512, 530; Taylor v. Castle, 42 Cal. 267; Nisbet v. Nash, 52 Cal. 540; Jones v. Clark, 42 Cal. 180; Higgins v. Armstrong, 9 Colo. 38, 10 Pac. 232; Skillman v. Lachman, 23 Cal. 203; Duryea v. Burt, 28 Cal. 569; McConnell v. Denver, 35 Cal. 365; Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777.

²⁷ Duryea v. Burt, 28 Cal. 569; Kahn v. Smelting Co., 102 U. S. 641.

²⁸ Bates, Partn. § 14. Unincorporated ditch companies, organized for the sale of water to miners and others, the stock in which is bought and sold at the pleasure of the owners, without consulting the co-owners, differ from ordinary commercial partnerships. Some of the incidents of a partnership pertain to such companies, and some of mere tenancies in common likewise pertain to them. McConnell v. Denver, 35 Cal. 365.

²⁹ Nolan v. Lovelock, 1 Mont. 224; Bybee v. Hawkett, 12 Fed. 649; Skillman v. Lachman, 23 Cal. 198; Judge v. Braswell, 13 Bush (Ky.), 67, 26 Am. Rep. 185; Babcock v. Stewart, 58 Pa. 179; Burgan v. Lyell, 2 Mich. 102, Burdick's Cases, 312; Snyder v. Burnham, 77 Mo. 52; Higgins v. Armstrong, 9 Colo. 38. That parties are tenants in common is insufficient. Hartney v. Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 A. S. R. 1005.

common ownership and operation of a mine,⁸⁰ though the agreement need not be express but may be implied from the acts of the parties.^{80a}

Same—Joint-Stock Companies.

Joint-stock companies are a species of partnership, in which the capital stock is divided into transferable shares, much in the nature of shares in a corporation. There is, of course, no *delectus personarum* in such an association.⁸¹

6. Subpartnerships.—A subpartnership exists where one partner in an existing firm agrees to share his proportion of the profits with a third person in such a manner as to constitute himself and such third person partners.
7. Such a contract does not violate the principle of *delectus personarum*, for it does not make such third person a partner with the other partners in the original firm.

A subpartnership, is, as it were, a partnership within a partnership: It presupposes the existence of a partnership, to which it is itself subordinate. An agreement to share profits as common owners, constitutes a partnership only between the parties to the agreement. If, therefore, several persons are partners, that one of them agrees to share the profits

⁸⁰ *Bradley v. Harkness*, 26 Cal. 76; *Stapleton v. King*, 33 Iowa, 28, *Decker v. Howell*, 42 Cal. 636; *Duryea v. Burt*, 28 Cal. 569, 587; *Crawshay v. Maule*, 1 Swanst. 518; *Lawrence v. Robinson*, 4 Colo. 567. See, also, *Kimberly v. Arms*, 129 U. S. 512.

There must be an agreement to work the mine for the joint profit of the parties. *Doyle v. Burns*, 123 Iowa, 488, 99 N. W. 195.

Cotenants by coworking become mining partners without special contract. *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828, 81 A. S. R. 777.

^{80a} *Hartney v. Gosling*, 10 Wyo. 346, 68 Pac. 1118, 98 A. S. R. 1005.

⁸¹ See post, c. 12, "Joint-Stock Companies." See, also, *Hedge's Appeal*, 63 Pa. 273.

with a stranger as common owners, does not make the stranger a partner in the original firm.³² The principle of *delectus personarum*, already explained, forbids this. The result of such an agreement is to constitute what is called a "subpartnership,"—that is to say, it makes the parties to it partners *inter se*; but it in no way affects the other members of the original firm.³³ Even knowledge and approval of the subpartnership upon the part of the other members of the principal firm will not make the subpartner a partner in such firm upon the principle of consent or ratification.³⁴

A subpartner is not liable for the debts of the principal firm.³⁵ But where the so-called "subpartner" owns the entire interest, including profits and property, he must be considered as the real partner, standing in the place of the ostensible one, and assuming his obligations and liabilities.³⁶

³² *Ex parte Barrow*, 2 Rose, 252; *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495; *Reynolds v. Hicks*, 19 Ind. 113; *Burnett v. Snyder*, 81 N. Y. 550, *Mechem's Cases*, 125; *Setzer v. Beale*, 19 W. Va. 274; *Reilly v. Reilly*, 14 Mo. App. 62; *Bybee v. Hawkett*, 12 Fed. 649; *Nirdlinger v. Bernheimer*, 133 N. Y. 45, 30 N. E. 561.

³³ *Lindl. Partn.* p. 48.

³⁴ *Burnett v. Snyder*, 81 N. Y. 550, *Mechem's Cases*, 125; *Channel v. Fassitt*, 16 Ohio, 166; *Newland v. Tate*, 3 Ired. Eq. (N. C.) 226.

³⁵ *Burnett v. Snyder*, 81 N. Y. 550, *Mechem's Cases*, 125; *Newland v. Tate*, 3 Ired. Eq. (N. C.) 226; *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495; *Bybee v. Hawkett*, 12 Fed. 649; *Reynolds v. Hicks*, 19 Ind. 113. Under the doctrine which formerly almost universally prevailed—that any sharing in the profits rendered one liable as a partner—a subpartner was held liable for the debts of the principal firm. *Fitch v. Harrington*, 13 Gray (Mass.) 468; *Bering v. Crafts*, 9 Metc. (Mass.) 380. But, as will be seen hereafter, this doctrine was thoroughly exploded by the great case of *Cox v. Hickman*, 8 H. L. Cas. 268, *Burdick's Cases*, 65, *Mechem's Cases*, 70, and now it is almost universally conceded that a mere sharing in the profits will not render one liable as a partner.

³⁶ *Webb v. Johnson*, 95 Mich. 325, 54 N. W. 947. See, also, *Godard v. Hodges*, 1 Crompt. & M. 33.

SAME—SHARING PROFITS.

8. Whether or not a sharing of the profits of a business creates a partnership is best considered with reference to—
 - (a) The former doctrine, and
 - (b) The modern doctrine.
9. Former Doctrine.—Formerly all persons sharing the profits of a business were held liable as partners to third persons for the business debts of each other, irrespective of whether they were really partners, as between themselves or not.

Until the decision of the celebrated case of *Cox v. Hickman*, in 1860, the law was universally regarded as settled, that any sharing in the profits of a business constituted a partnership, or at least subjected the parties so sharing to a partner's liability, so far as third persons were concerned,³⁷ and all traces of this doctrine have not yet disappeared.³⁸ While

³⁷ *Grace v. Smith*, 2 W. Bl. 998, *Burdick's Cases*, 45, *Mechem's Cases*, 61; *Waugh v. Carver*, 2 H. Bl. 235, 2 *Smith, Lead. Cas.* (9th ed.) 1178, *Burdick's Cases*, 47, *Mechem's Cases*, 67; *Cheap v. Cramond*, 4 Barn. & Ald. 663; *Ex parte Hamper*, 17 Ves. 412; *Heyhoe v. Burge*, 9 C. B. 431; *Purviance v. McClintee*, 6 Serg. & R. (Pa.) 259.

³⁸ *Wessels v. Weiss*, 166 Pa. 490, 31 Atl. 247; *Edwards v. Tracy*, 62 Pa. 374; *Lord v. Proctor*, 7 Phila. (Pa.) 630; *Merrall v. Dobbins*, 169 Pa. 480, 32 Atl. 578, *Burdick's Cases*, 86; *Leggett v. Hyde*, 58 N. Y. 272; *Burdick's Cases*, 50; *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745, *Burdick's Cases*, 57; *Burnett v. Snyder*, 81 N. Y. 550, *Mechem's Cases*, 125.

In Georgia sharing in the profits, as profits, renders the parties to the transaction partners as to third parties. *Brandon & Dreyer v. Connor*, 117 Ga. 759, 63 L. R. A. 260. The court refers to the rule laid down in the first edition of this work (post, §§ 10, 34), and states that the trend of modern authorities is to support such rule, but it feels bound to follow the rule laid down in *Buckner v. Lee*, 8 Ga. 285, and followed in numerous cases, so long as such cases stand unreviewed and unreversed.

this view of the nature of a partnership prevailed, it was held that one who received a share in the profits as compensation in lieu of salary for services rendered,³⁹ or rent of property used in the business,⁴⁰ or interest on, or in payment of money loaned,⁴¹ was liable as a partner to third persons for the debts of the firm, irrespective of the actual intent of the parties, and it was immaterial whether they were partners *inter se* or not.⁴² The only reason ever assigned for this arbitrary rule

³⁹ *Cheap v. Cramond*, 4 Barn. & Ald. 663; *Ex parte Rowlandson*, 1 Rose, 92; *Ex parte Digby*, 1 Deac. 341; *Rowland v. Long*, 45 Md. 439; *Taylor v. Terme*, 3 Har. & J. (Md.) 505; *Strader v. White*, 2 Neb. 348; *Miller v. Hughes*, 1 A. K. Marsh. (Ky.) 181; *Lomme v. Kintzing*, 1 Mont. 290; *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745, *Burdick's Cases*, 57.

⁴⁰ *Dalton City Co. v. Dalton Mfg. Co.*, 33 Ga. 243; *Dalton City Co. v. Hawes*, 37 Ga. 115. And see *Adams v. Carter*, 53 Ga. 160; *Buckner v. Lee*, 8 Ga. 285. "It avails nothing that they specify that they shall receive one-half the net profits 'as rent.' It is apparent that what they are to receive will be more or less, or nothing at all, as the 'accidents of trade' may determine. This being ascertained, the conclusion of law is that whatever they may receive will be received 'as profits,' not as rent. It matters not that the parties christen the contract 'lease,' and its fruit 'rent.' The law looks through the whole agreement, and finding that the Dalton City Company are to receive no fruit, unless there be net profits, and only a stipulated proportion of them, sees therein evidence of a community of losses and profits, and demoninates it a partnership." *Dalton City Co. v. Dalton Mfg. Co.*, 33 Ga. 255.

⁴¹ *Grace v. Smith*, 2 W. Bl. 998, *Burdick's Cases*, 45, *Mechem's Cases*, 61; *Bloxham v. Pell*, cited in 2 W. Bl. 999; *Leggett v. Hyde*, N. Y. 272, *Burdick's Cases*, 50; *Manhattan Brass & Mfg. Co. v. Sears*, 45 N. Y. 797; *Cushman v. Bailey*, 1 Hill (N. Y.) 526; *Parker v. Canfield*, 37 Conn. 250, 9 Am. Rep. 317; *Rosenfield v. Haight*, 53 Wis. 260, 10 N. W. 378, 40 Am. Rep. 770.

⁴² In *Waugh v. Carver*, 2 H. Bl. 235, 2 Smith, Lead. Cas. (9th ed.) 1178, *Burdick's Cases*, 47, *Mechem's Cases*, 67, it was admitted by the court that the agreement in question did not constitute the parties actual partners, but they were both held liable, nevertheless, for the debt of one of them.

For cases recognizing the distinction between partnership *inter se* and partnership as to third persons, see the following cases: *Price*

was that, "if any one takes part of the profit, he takes a part of that fund upon which the creditor of the trader relies for repayment."⁴³ But, as has been pointed out, this places the question of partnership or no partnership upon a false footing, for creditors do not look to the profits for security for their debts at all, and, indeed, the existence of profits is inconsistent with the existence of debts.⁴⁴

The strictness of the old rule as to profit sharing gave rise to subtle distinctions between a payment out of the profits and a payment varying with them; the former being held to create a partnership, but the latter not.⁴⁵ This distinction

v. Alexander, 2 G. Greene (Iowa), 427, 52 Am. Dec. 526; *Bromley v. Elliot*, 38 N. H. 287; *Pitkin v. Pitkin*, 7 Conn. 311; *Stanchfield v. Palmer*, 4 G. Greene (Iowa), 23; *Gill v. Kuhn*, 6 Serg. & R. (Pa.) 333; *Kellogg v. Griswold*, 12 Vt. 291; *Brandon v. Conner*, 117 Ga. 759, 45 S. E. 371.

⁴³ *Grace v. Smith*, 2 W. Bl. 998, *Burdick's Cases*, 45, *Mechem's Cases*, 61; *Parker v. Canfield*, 37 Conn. 250, 9 Am. Rep. 320.

⁴⁴ *Lindl. Partn.* 26. "Persons held liable as partners to third persons did not take part of the funds upon which creditors relied, any more than did a salaried agent, and, in fact, less so; for, when a partnership was unable to pay its debts, it was because there were no profits, and, in that case, such person took nothing, whereas, if his compensation had been definite, the fund would have been diminished." *Dates, Partn.* § 15. See, also, *Eastman v. Clark*, 53 N. H. 276.

"The ground of the doctrine was that a person who shares the profits ought to share the losses, because he takes a part of the fund out of which the losses are to be paid. But the ground will not bear examination; for, in point of fact, the losses are no more payable out of the profits than out of the capital, and in other cases it has been decided, quite inconsistently with this ground, that it is only a participation in the net, not the gross, profits, which makes the participant a quasi-partner. Other grounds, but none more satisfactory, have been suggested. Indeed, the doctrine, though well received by some judges, appears to have been always regarded by others as an anomaly or legal solecism." *Boston & Colorado Smelting Co. v. Smith*, 13 R. I. 31.

⁴⁵ *Ex parte Hamper*, 17 Ves. 403; *Grace v. Smith*, 2 W. Bl. 998, *Burdick's Cases*, 45, *Mechem's Cases*, 61. Although a right to share

was not universally recognized.⁴⁶ These subtle distinctions have been almost universally swept away, and the whole law of partnership liability has been placed upon a sound basis of principle by modern decisions.

10. Modern Doctrine.—Under the modern doctrine of partnership, persons are not liable to third persons as partners, although they share profits, unless—

- (a) They are really partners *inter se*, or
- (b) Have held themselves out as partners under such circumstances as to estop them from denying it.

The modern doctrine of partnership dates from the decision in 1860, by the English house of lords, of the leading case of *Cox v. Hickman*.⁴⁷ In this case, it was decided that persons who share the profits of a business do not incur the liabilities of partners, unless that business is carried on by themselves personally, or by others as their real or ostensible agents.⁴⁸

in the profits may constitute one a partner, a commission equal to such share as compensation does not. *Edwards v. Tracy*, 62 Pa. 374. In *Buckner v. Lee*, 8 Ga. 285, Judge Nisbet says: "It is clear, then, that if one is to receive a certain proportion of profits, as one-third, or one-half, as profits, he is a partner. If a certain sum is to be paid out of the profits, and the party does not look to that fund alone for payment, he is not a partner; but if the sum to be paid is not fixed, but may be increased or diminished by the amount or accidents of the business, then the receiver is a partner." Quoted and followed in *Dalton City Co. v. Dalton Mfg. Co.*, 33 Ga. 254.

⁴⁶ In *Dalton City Co. v. Hawes*, 37 Ga. 115, an agreement to pay, as rent, "a sum equal to one-half of the net profits," was held to create a partnership. See, also, *Parker v. Canfield*, 37 Conn. 250, 9 Am. Rep. 320, wherein the court said: "The mere use of the expression, 'a sum equal to the profits,' in lieu of the word 'profits,' does not change the nature of the contract."

⁴⁷ 8 H. L. Cas. 268. See, also, for reports of the same case below, 3 C. B. (N. S.) 523, and 18 C. B. 617.

⁴⁸ *Beckham v. Drake*, 9 Mees. & W. 79; *Ernest v. Nicholls*, 6 H. L.

This case has ever since been almost universally followed and approved.⁴⁹ It was at once the end of the old theory of partnership, and the starting point of a new doctrine. It put an end to two notions which had theretofore been regarded as fundamental: First, that third persons may hold to the liability of partners those who, in fact, are not partners, merely because some other relation exists between them; and, second, that participation in the profits of a business is conclusive of a partnership.⁵⁰ It placed partnership liability upon one or the other of three well-recognized grounds of liability at common law, viz., personal commission, agency, estoppel, and totally abandoned the rule, for which no sound principle had ever been given, that mere profit sharing created a liability to third persons. Nevertheless, the courts of a few states have distinctly refused to follow the rule established by *Cox v. Hickman*, and still cling to the old rule that a sharing of profits renders one liable as a partner to third persons, although there is, in fact, no partnership *inter se*;⁵¹ and, in many recent cases, expressions may be found to the effect that a partnership may exist as to third persons where there is none *inter se*.

Cas. 400; *Wilson v. Whitehead*, 10 Mees. & W. 503; *Eastman v. Clark*, 53 N. H. 276.

⁴⁹ See *Mollwo v. Court of Wards*, L. R. 4 P. C. 419; *Pooley v. Driver*, 5 Ch. Div. 450; *Home v. Hammond*, L. R. 7 Exch. 218. For American cases, see *infra*, §§ 12-15.

⁵⁰ *Pars. Partn.* § 43; *Eastman v. Clark*, 53 N. H. 276. "Since this decision, participation in profits has ceased to be a conclusive test either of partnership, or of liability as a partner." 9 *Enc. Laws Eng.* p. 455, tit. "Partnership."

⁵¹ In New York there is considerable confusion in the decisions as to what is the true test of partnership. It has been several times held that *Cox v. Hickman* has never been acknowledged in New York, and that *Grace v. Smith* and *Waugh v. Carver* are still the recognized authorities. But, nevertheless, the substantial results of *Cox v. Hickman* are apparent in many cases. *Leggett v. Hyde*, 58

TESTS OF PARTNERSHIP.

II. Various arbitrary tests of partnership have been suggested from time to time, such as—

- (a) Profit sharing.
- (b) Mutual agency.
- (c) Intention of parties.

Profit Sharing.

It has already been shown that a mere sharing in the profits of a business is no longer a conclusive test of partnership,

N. Y. 272, *Burdick's Cases*, 50; *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745; *Cassidy v. Hall*, 97 N. Y. 159; *Burnett v. Snyder*, 81 N. Y. 550, *Mechem's Cases*, 125. In *Johnson v. Alexander*, 95 N. Y. St. Rep. 351, joint proprietorship in the profits is distinctly recognized as the test of partnership, and yet it is declared that with a few recognized exceptions, sharing profits renders one liable as a partner to third persons. The reasoning of *Leggett v. Hyde*, 58 N. Y. 272, *Burdick's Cases*, 50, and *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745, is quoted, approved, and followed.

In Pennsylvania, also, we find a deliberate rejection of the rule in *Cox v. Hickman*, and the almost universally repudiated rule of *Grace v. Smith* and *Waugh v. Carver* is followed upon the principle of *stare decisis*. The inconvenience and injustice of the old rule is, however, partially modified by certain statutory exceptions. Nevertheless, in cases not falling within these statutory exceptions, profit-sharing is still the test of partnership liability. *Wessels v. Weiss*, 166 Pa. 490, 31 Atl. 247; *Edwards v. Tracy*, 62 Pa. 374; *Lord v. Proctor*, 7 Phila. (Pa.) 630; *Merrall v. Dobbins*, 169 Pa. 480, 32 Atl. 578, *Burdick's Cases*, 86. But in *Merrall v. Dobbins*, 169 Pa. 487, 32 Atl. 578, *Burdick's Cases*, 86, the court intimates that the question of the true rule might still be considered, and held that the "intention of the parties to become joint owners of the business," showed conclusively that such persons were partners. So, also, in *re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383, the true rule was distinctly recognized.

The principle adopted in some jurisdictions, that a person may receive a share of the profits of a business by way of salary, or compensation for services, without being held liable as a partner to third persons, has not been adopted here, and cannot be received

either as between the parties themselves or as to third persons. Various illustrations of this rule will be given in a succeeding section.⁵²

SAME—MUTUAL AGENCY AS A TEST.

12. Partners are mutual agents in the conduct of the partnership business, but mutual agency is not a test of partnership.

After the abandonment of profit sharing as a conclusive test of partnership, the view has sometimes been taken that *Cox v. Hickman* substituted mutual agency as a test.⁵³ But,

unless with qualifications that the true character of the agreement is known, or the apparent relations of the parties are such as should put parties dealing with them on inquiry. *Bromley v. Elliot*, 38 N. H. 287. But see the later case of *Eastman v. Clark*, 53 N. H. 276, which is a leading American case on partnership. See, also, *Cossack v. Burgwyn*, 112 N. C. 304, 16 S. E. 900, and *Southern Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. 467.

⁵² See post, §§ 14, 15.

⁵³ *Shaw v. Galt*, 16 Ir. C. L. 357; *Eastman v. Clark*, 53 N. H. 276; *Lindl. Partn.* p. 34. See, also, opinion of Martin, B., in *Holme v. Hammond*, L. R. 7 Exch. 218. The element of agency for each other in and about the business in question is perhaps the most conclusive evidence of a partnership. *Jernee v. Simonson*, 58 N. J. Eq. 282, 43 Atl. 370, citing *Cox v. Hickman*, 8 H. L. Cas. 268, *Burdick's Cases*, 65, *Mechem's Cases*, 70, and *Wild v. Davenport*, 48 N. J. Law, 135, 7 Atl. 295, *Burdick's Cases*, 77.

In *Harvey v. Childs*, 28 Ohio St. 319, *Mechem's Cases*, 97, it was held that "participation in the profits of a business, though cogent evidence of a partnership, is not necessarily decisive of the question. The evidence must show that the persons taking the profits shared them as principals in a joint business, in which each has an express or implied authority to bind the other." On page 231 of this case it was said: "Although a partnership may be said to rest upon the idea of a communion of profits, nevertheless the foundation of the liability of one partner for the acts of another is the relation they sustain to each other as being each principal and agent." See, also, *Merchants' Nat. Bank v. Standard Wagon Co.*, 9 Ohio Dec. 384.

as has been pointed out in later English cases,⁵⁴ the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership, and not partnership from agency.⁵⁵ Such a test seems to give a synonym, rather than a definition—another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner who stands in the relation of a principal to those by whom the business is actually carried on adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent.⁵⁶

⁵⁴ *Pooley v. Driver*, 5 Ch. Div. 458. See, also, opinion of Cleasby, B., and Kelly, C. B., in *Holme v. Hammond*, L. R. 7 Exch. 218.

⁵⁵ *Meehan v. Valentine*, 145 U. S. 611, *Burdick's Cases*, 80, *Mechem's Cases*, 103. "The case [i. e., *Cox v. Hickman*] did not offer any alternative test of a partnership, for the suggestion of the necessity of an agency is of no assistance in a doubtful case. The agency is the result of the partnership, not vice versa." *Partn. § 43*, citing opinion of Cleasby, B., in *Holme v. Hammond*, L. R. 7 Exch. 218, 233. That mutual agency cannot be a test of partnership is apparent from the fact that several persons may be partners because that is their intention, and yet one or more of them may, by stipulation in the partnership agreement, be deprived of all power to act for or in conjunction with the other partners, either as principal or agent. See *Holme v. Hammond*, L. R. 7 Exch. 218; *Pooley v. Driver*, 5 Ch. Div. 458.

⁵⁶ *Meehan v. Valentine*, 145 U. S. 611, *Burdick's Cases*, 80, *Mechem's Cases*, 103. In *Pooley v. Driver*, 5 Ch. Div. 458, Sir George Jessel, the master of the rolls, said: "You do not help yourself in the slightest degree in arriving at a conclusion by stating that he must be an agent for the others. It is only stating, in other words, that he must be a partner, inasmuch as every partnership involves this kind of agency; or, if you state that he is agent for the others, you state that he is a partner." See, also, *Harvey v. Childs*, 23 Ohio St. 319, 22 Am. Rep. 387, *Mechem's Cases*, 97.

SAME—INTENTION THE REAL TEST.

13. The intention of the parties, as gathered from a construction of the contract they have made, is the real test of the existence of a partnership.

As has been seen, the distinction between partnerships *inter se* and partnerships as to third persons is no longer recognized. Except in the single case of estoppel by holding out, partnership liability depends upon the actual existence of a partnership *inter se*. Now, since partnership is a relation arising out of a particular kind of contract, it would seem to be obvious that the existence of the relation depends exclusively upon the intention of the parties to enter into that particular kind of a contract, for all contracts are construed according to the manifest intent of the parties. Accordingly, although intent was not formerly recognized as a test of partnership,⁵⁷ it is now well established that the fundamental rule to be observed in determining the existence of a partnership is that regard must be paid to the true contract and intention of the parties, as appearing from all the facts of the case.⁵⁸ But if a part-

⁵⁷ See ante, § 9. See, also, *Bromley v. Elliot*, 38 N. H. 287.

⁵⁸ *Cox v. Hickman*, 8 H. L. Cas. 268, *Burdick's Cases*, 65, *Mechem's Cases*, 70; *Mollwo v. Court of Wards*, L. R. 4 P. C. 419; *Badeley v. Consolidated Bank*, 38 Ch. Div. 258; *Webster v. Clark*, 34 Fla. 637, 16 So. 601; *Bradley v. Ely*, 24 Ind. App. 2, 56 N. E. 44; *Niehoff v. Dudley*, 40 Ill. 406; *Stevens v. Faucet*, 24 Ill. 483; *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, *Mechem's Cases*, 86, 40 Am. Rep. 465; *Polk v. Buchanan*, 5 Sneed (Tenn.) 721, *Burdick's Cases*, 62; *A. N. Kellogg Newspaper Co. v. Farrell*, 88 Mo. 594; *Linter v. Millikin*, 47 Ill. 178; *Salter v. Ham*, 31 N. Y. 321; *Gray v. Gibson*, 6 Mich. 300; *Jernee v. Simonson*, 58 N. J. Eq. 282, 43 Atl. 370; *Central City Sav. Bank v. Walker*, 66 N. Y. 431; *Hayward v. Barron*, 19 N. Y. Supp. 384; *Earle v. Art. Library Pub. Co.*, 95 Fed. 548; *National Surety Co. v. T. B. Townsend Brick & Contracting Co.*, 176 Ill. 156, 52 N. E. 938; *Cannon v. Brush Elec. Co.*, 96 Md. 446, 54 Atl. 121, 94 Am. St. Rep.

nership is the legal result of the agreement actually made, the parties thereto will be partners, though they have intended to avoid this consequence, or even where they have expressly stipulated that they are not to be partners.⁵⁹ This may be

584. Partnership is a fact depending upon agreement, and not a mere matter of legal imputation, and the only case in which a person who is sought to be charged as a partner is precluded from proving the actual fact is when he has held himself out, or permitted himself to be held out, as a partner. *Boston & Colorado Smelting Co. v. Smith*, 13 R. I. 34. As between themselves, though not as to third persons, the intent was controlling, even under the old doctrine as to partnership. See *Wright v. Taylor*, 9 Wend. (N. Y.) 538; *Ex parte Hamper*, 17 Ves. 403; *Kerr v. Potter*, 6 Gill (Md.) 404; *Culley v. Edwards*, 44 Ark. 428. In *Hazard v. Hazard*, 1 Story, 374, Judge Story said that, as to third persons, a partnership might arise by operation of law against the intention of the parties, but that a partnership *inter se* exists only when such is the actual intention of the parties.

⁵⁹ *Pooley v. Driver*, 5 Ch. Div. 458; *Ex parte Delhasse*, 7 Ch. Div. 511; *Adam v. Newbigging*, L. R. 13 App. Cas. 315; *Davis v. Davis* (1894), 1 Ch. Div. 393; *Burdick's Cases*, 12; *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785; *Mechem's Cases*, 86, 40 Am. Rep. 465; *Leggett v. Hyde*, 58 N. Y. 272, *Burdick's Cases*, 50; *Chapman v. Hughes*, 37 Pac. 1048, 38 Pac. 109, 104 Cal. 302; *Duryea v. Whitcomb*, 31 Vt. 395, *Mechem's Cases*, 57; *Bigelow v. Elliot*, 1 Cliff. 28, Fed. Cas. No. 1,399; *Manhattan Brass & Mfg. Co. v. Sears*, 45 N. Y. 797, 6 Am. Rep. 177; *Rosenfeld v. Haight*, 53 Wis. 260, 10 N. W. 378; *Huggins v. Huggins*, 117 Ga. 151, 43 S. E. 759; *City Nat. Bank v. Stone*, 131 Mich. 588, 92 N. W. 99; *Mulhall v. Cheatham*, 1 Mo. App. 476; *Boston & Colorado Smelting Co. v. Smith*, 13 R. I. 31; *Wehrman v. McFarlan*, 9 Ohio Dec. 402. "The intention is ascertained from the whole of the contract,—from the actual relations it creates,—and not from the fact that the parties denominate it a partnership, or may declare that a partnership is not intended." *Bestor v. Barker*, 106 Ala. 240, 17 So. 389.

In *Adam v. Newbigging*, L. R. 13 App. Cas. 316, the court said: "The draftsman apparently looked at all the cases, beginning at *Waugh v. Carver*, 2 H. Bl. 235; 1 *Smith*, Lead. Cas. (9th Ed.) 877, *Burdick's Cases*, 47, and ran through them all, including *Pooley v. Driver*, 5 Ch. Div. 458; *Mollwo v. Court of Wards*, L. R. 4 P. C. 419; *Ex parte Delhasse*, 7 Ch. Div. 511, and *Ex parte Tennant*, 6 Ch. Div. 303, and cleverly strives to avoid the effect of each test discussed

thought to violate the rule that the intent is controlling,⁶⁰ but it does not. The intent which is controlling is the intent to do those things which the law has declared constitute a partnership. If the parties intend and do those things which the laws says constitute a partnership, then the parties are *ipso facto* partners, and an express stipulation that they do not intend to form a partnership simply shows that they have mistaken the legal effect of the agreement which they intended to make.⁶¹ If the parties make an agreement which is a part-

in these cases by something which should have the same effect, but which should avoid the specific test. I wish to say every such expedient would be absolutely void in the view I take of the law."

⁶⁰ In *London Assur. Co. v. Drennen*, 116 U. S. 461, it was said that, as between the parties themselves the letter of the agreement controls. In *Sailors v. Nixon-Jones Printing Co.*, 20 Ill. App. 509, the court said: "A partnership *inter se* must result from the intention of the parties as expressed in the contract, and they can not be made to assume toward each other a relation which they have expressly contracted not to assume. The terms of the agreement, where there is one, fixes the real status of the parties toward each other." If parties associated in business in such a manner as to make them partners with respect to third persons expressly agree that a partnership shall not exist, they are not partners as between themselves. *Gill v. Kuhn*, 6 Serg. & R. (Pa.) 332. See, also, *Kerr v. Potter*, 6 Gill (Md.) 404.

⁶¹ *Bradley v. Ely*, 24 Ind. App. 2, 56 N. E. 44, citing, with approval, *George*, Partn. p. 31. In *Pooley v. Driver*, 5 Ch. Div. 458, an agreement very carefully drawn, with the intention of excluding any inference of a partnership between the contracting parties was held, nevertheless, to create a partnership. The court said (page 483): "What they did not intend was to incur the liability of partners. If intending to be a partner is intending to take the profits, then they did intend to be partners. If intending to take the profits, and have the business carried on for their benefit, was intending to be partners, they did intend to be partners. If intending to see that the money was applied for that purpose, and for no other, and to exercise an efficient control over it, so that they might have brought an action to restrain it from being otherwise applied, and so forth, was intending to be partners, then they did intend to be partners."

"The real inquiry always is, have the parties by their contract,

nership in fact, it is of no importance that they call it something else. Names go for nothing when the substance of the arrangement shows them to be inapplicable.⁶² Persons may become partners without their knowing it; the relation resulting from the terms they have used in the contract, or from the nature of the undertaking.⁶³ On the other hand, even if

combined their property, labor or skill in an enterprise or business, as principals, for the purpose of joint profit? If they have done so, they are partners in that business or enterprise, no matter how earnestly they may protest they are not, or how distant the formation of a partnership was from their minds. The terms of their contract given, the law steps in and declares what their relations are to the enterprise or business, and to each other." *Spaulding v. Stubbings*, 86 Wis. 255, 56 N. W. 469, *Mechem's Cases*, 117. See, also, *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484.

⁶² Per Cooley, J., in *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, *Mechem's Cases*, 86, quoted with approval in *Webster v. Clark*, 34 Fla. 637, 16 So. 601. "The intent of the parties must be ascertained from the legal effect of the instrument, and not the names employed by the parties." *Van Kuren v. Trenton L. & M. Mfg. Co.*, 13 N. J. Eq. 306. "Persons may become copartners, without a special agreement for the purpose, by virtue of the effect which the law gives to an undertaking for the use of a common capital, with division of profits and losses, in continuous transactions, though carried on in an incidental manner. Therefore, if the plaintiff, without a special or express agreement to form a partnership, contributed a fund to be invested, as occasion offered, in notes, stocks, and the like, and agreed to share the gains and losses thereof between them, they thereby became partners in the view of the law, and the court properly instructed the jury to that effect, as requested by the plaintiffs." *Robinson v. Parker*, 11 App. Cas. (D. C.) 140.

⁶³ *Lintner v. Millikin*, 47 Ill. 181. It is immaterial that the parties are not aware of the legal consequences of their acts. Such consequences attach, nevertheless. *Mulhall v. Cheatham*, 1 Mo. App. 481. In *Chapman v. Hughes*, 104 Cal. 304, 37 Pac. 1048, 37 Pac. 109, the court said: "Whether the parties knew they were partners or not, they certainly intended and contracted to do all that in law is necessary to create a partnership. The relation of partnership may be established, although the parties may not expressly intend to create such relationship."

the parties intend to be partners, and so expressly stipulate, yet, if they so frame the terms and provisions of their contract as to leave them without any community of interest in the business or profits, they are not partners in fact or in law.⁶⁴ Of course, in a doubtful case, the expressed intent may be sufficient to turn the scales one way or the other,⁶⁵ and, if the expressed intent is not inconsistent with the other terms of the contract, it will be controlling.⁶⁶ Where the rights of third persons are not involved, the contract will be liberally construed, so as to effectuate the actual understanding of the parties, and the purposes they had in view.⁶⁷

⁶⁴ *Sailors v. Nixon-Jones Printing Co.*, 20 Ill. App. 509, *Mechem's Cases*, 53; *McDonald v. Matney*, 82 Mo. 358, 366; *Dwinel v. Stone*, 30 Me. 384, *Burdick's Cases*, 17; *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573, 592; *Burnett v. Snyder*, 76 N. Y. 344; *Van Kuren v. Trenton L. & M. Mfg. Co.*, 13 N. J. Eq. 302, 306; *Ryder v. Wilcox*, 103 Mass. 24, *Burdick's Cases*, 525; *Oliver v. Gray*, 4 Ark. 425, *Burdick's Cases*, 16; *Hayward v. Barron*, 19 N. Y. Supp. 384.

⁶⁵ "A clause negativing a partnership may throw light on other clauses, and rebut inferences which might be drawn from them alone." *Lindl. Partn.* p. 11. "Every doubtful case must be solved in favor of their intent; otherwise, we should carry the doctrine of constructive partnership so far as to render it a trap to the unwary." *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, *Mechem's Cases*, 86, citing *Kent, C. J.*, in *Post v. Kimberly*, 9 Johns. (N. Y.) 504.

⁶⁶ *Gill v. Kuhn*, 6 Serg. & R. (Pa.) 333; *Kerr v. Potter*, 6 Gill (Md.) 404; *Smith v. Walker*, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783; *Runnels v. Moffat*, 73 Mich. 188, 41 N. W. 224; *Reddington v. Lanahan*, 59 Md. 429; *Paul v. Cullum*, 132 U. S. 539, 551; *Pillsbury v. Pillsbury*, 20 N. H. 90. An agreement which purports on its face to be a copartnership agreement, and which provides that the parties thereto shall share equally in expenses, losses, and gains, cannot be treated as a mere contract of employment. *Smith v. Walker*, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

⁶⁷ 17 Am. & Eng. Enc. Law (1st ed.), p. 834, citing *Stevens v. Gainesville Nat. Bank*, 62 Tex. 499; *Hitchings v. Ellis*, 12 Gray (Mass.) 452; *Couch v. Woodruff*, 63 Ala. 466; *Tayloe v. Bush*, 75 Ala. 432.

SAME—WHAT MUST BE INTENDED—COMMON OWNERSHIP
OF PROFITS.

14. Where the intention of the parties to a contract is to carry on a business, and share the profits between them as common owners, a partnership is created.
15. Where the intention is not to share the profits as common owners, but as a personal debt due from some of the associates to the others, the amount of which is measured by the profits, no partnership is created.

The ultimate and conclusive test of a partnership is co-ownership of the profits of a business.⁶⁸ "Where a part of the profits themselves is the property of the party, he is a partner. Where their amount merely ascertains the amount of a debt or duty, but they themselves do not belong to the party, there is not a partnership."⁶⁹ "If there is a commun-

⁶⁸ *Bradley v. Ely*, 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. Rep. 251; *Le Fevre v. Castagnio*, 5 Colo. 564. See, also, cases cited in the succeeding part of this section in illustration of the rule. "One essential element of a partnership is a community of interest in the subject-matter of it. *Tenet totum in communi et nihil separatim per se*, has been the keystone of the arch since the days of Bracton. From this arises the right of each partner to make contracts, incur liabilities, manage the whole business, and dispose of the whole property of the partnership, for its purposes, in the same manner and with the same power, as all the partners could when acting together." *Dwinel v. Stone*, 30 Me. 384, *Burdick's Cases*, 17. But it must be noted in this connection, that "the subject-matter" of a partnership may be merely the profits. It is not necessary that there should be a community of interest in the property or capital employed to earn the profits. See *infra*, § 22.

⁶⁹ *Per Henderson, C. J.*, in *Cox v. Delano*, 3 Dev. (N. C.) 90. It should be noted that this happy and accurate statement of the one essential element of a partnership was made in 1831, nearly thirty years before the decision of the celebrated case of *Cox v. Hickman*. *See, also*, to the same effect, *Waggoner v. First Nat. Bank*, 43 Neb.

ity of profits, a partnership follows. Community of profits means a proprietorship in them, as distinguished from a personal claim upon the other associates. In other words, a property right in them from the start, in one associate as much as in the other."⁷⁰ Where there is such a community of

84, 61 N. W. 112; *Webster v. Clark*, 34 Fla. 637, 16 So. 601; *Meehan v. Valentine*, 145 U. S. 611, *Burdick's Cases*, 80, *Mechem's Cases*, 103; *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484; *Palliser v. Erhardt* (Sup.), 61 N. Y. 192; *Oppenheimer v. Clemmons*, 18 Fed. 888. "Whether a man is a partner or not depends upon the nature of his interest in the profits. . . . If his interest is that of owner, then he is a partner; otherwise not." *Wheeler v. Farmer*, 38 Cal. 205.

"A person may be allowed, in special cases, to receive part of the profits of a business, without become a legal or responsible partner, where the whole evidence leads to the conclusion that the receiver of the money took it only as wages, or specific compensation or payment, and did not intend to acquire any interest in, or control over, the business, or in the profits as they accrue, and before they are ascertained and divided, but only after they were ascertained to find in them the fund, and in this amount the measure of his payment." *Ellison v. Stuart*, 2 Pen. (Del.) 179, 43 Atl. 838.

The statement met with in the cases both before and since *Cox v. Hickman*, that a person must be interested in the profits "as profits," is a recognition of the true rule. In *Grace v. Smith*, 2 W. Bl. 998, *Burdick's Cases*, 45, *Mechem's Cases*, 61, which is the very fountain head of the profit-sharing rule, the distinction between sharing profits as profits (i. e., sharing them as proprietors), and merely relying upon profits as a fund for payment, is distinctly recognized. The long line of cases holding that any sharing of profits was sufficient to make one liable as a partner finds but little support in this case. "Interest in profits does not necessarily make a person a partner, or liable as a partner. *Partn. 67*. To have that effect, it must be, as the books express it, an interest in profits as profits—a proprietary interest, or as Mr. Justice Clifford says, in *Berthold v. Goldsmith*, 24 How. (U. S.) 537, 'the party must be in some way interested in the profits as principal.' Or, as expressed in *Harvey v. Childs*, 28 Ohio St. 319, 'the evidence must show that the persons taking the profits shared them as principals in a joint business, in which each has an express or implied authority to bind the others. *Le Fevre v. Castagnio*, 5 Colo. 571.

⁷⁰ *Bradley v. Ely*, 24 Ind. App. 2, 56 N. E. 44, quoting, with ap-

ownership in the profits, the parties are necessarily mutual principals and agents in carrying on the business, and earning the profits, and, as has been seen, such a relation is a synonym of partnership.⁷¹

The rule here stated is clear enough. The difficulty is in its application. The true intention of the parties, as appearing from all the facts and circumstances of the case, is controlling. If, so construed, the contract manifests an intention to be joint owners of the profits, it constitutes a partnership; otherwise not. This intention is no longer ascertained by the application of any arbitrary tests.⁷² It is obviously almost impossible to define accurately what are the states or circumstances which establish the intention to be partners, or mutual agents. Capital embarked, powers of interference in the business, profits received, etc., are all circumstances to be taken into consideration in deciding the question.⁷³

proval, *George, Partn.* p. 50. And see *Gulf City Shingling Co. v. Boyles*, 129 Ala. 192, 29 So. 800.

⁷¹ See *George, Partn.*, p. 52.

⁷² *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, *Mechem's Cases*, 86, wherein Cooley, J., said: "So far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests, it was erroneous and mischievous, and the proper corrective has been applied." See, also, *Eastman v. Clark*, 53 N. H. 276, wherein the results of *Cox v. Hickman*, *supra*, are discussed in an elaborate opinion, reviewing many cases. As between the parties, the question of the existence of a partnership relation is one of intention, to be gathered from all the facts and circumstances. *National Surety Co. v. T. B. Townsend Brick & Contracting Co.*, 176 Ill. 156, 52 N. E. 938. Where there is no written agreement between the parties, their intention may be inferred from their course of conduct, and admissions with respect to the business carried on. *Earle v. Art Library Pub. Co.*, 95 Fed. 548.

⁷³ *Parker v. Canfield*, 37 Conn. 250; *Ex parte Tennant*, 6 Ch. Div. 315; *Waggoner v. First Nat. Bank*, 43 Neb. 84, 61 N. W. 112. See, also, *infra*, § 16, "Sharing Profits as Evidence of Intention;" and *infra*, § 22, "Common Stock or Capital." A lender does not become a partner by taking profits instead of interest for his loan, where he

Under the rule here stated, persons sharing the profits of a business under the following circumstances have been held not to be partners by reason of such participation in the profits, viz.: A creditor receiving payment of his debt by instalments, or otherwise, out of the profits of a business;⁷⁴ a servant or agent employed in the business, and remunerated by a share of the profits in lieu of salary;⁷⁵ a widow or child of a de-

relinquishes the money to the borrower, and does not retain control over it in the partnership business. *Ellison v. Stuart*, 2 Pen. (Del.) 179, 43 Atl. 836. The best evidence of the existence of a partnership is the contract creating it. If proof of the contract is not within reach, its existence may be inferred (1) from proof of contribution to the partnership stock; (2) from participation in profits; and (3) from the acts and declarations of the parties sought to be charged. *In re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383.

"Where the suit is between the parties as partners, stricter proof is required of the existence of the partnership, than where the action is by a third person against either actual partners, or persons sought to be charged as partners, inasmuch as the latter are more likely to know the means whereby the fact of partnership may be proved than such third persons." *Ellison v. Stuart*, 2 Pen. (Del.), 43 Atl. 838.

⁷⁴ *Cox v. Hickman*, 8 H. L. Cas. 268, *Burdick's Cases*, 65, *Mechem's Cases*, 70.

⁷⁵ *Stafford v. Sibley*, 106 Ala. 189, 17 So. 324; *Randle v. State*, 49 Ala. 14; *Ellison v. Stuart*, 2 Pen. (Del.) 179, 43 Atl. 838; *Wheeler v. Farmer*, 38 Cal. 203; *Thornton v. McDonald*, 108 Ga. 3, 33 S. E. 680; *Le Fevre v. Castagnio*, 5 Colo. 564; *Loomis v. Marshall*, 12 Conn. 70; *Parker v. Canfield*, 37 Conn. 250; *Vinson v. Beveridge*, 3 MacArthur (D. C.) 597; *Podgett v. Ford*, 117 Ga. 508; *Niehoff v. Dudley*, 40 Ill. 406; *Parker v. Fergus*, 43 Ill. 437; *Mayfield v. Turner*, 180 Ill. 332, 54 N. E. 418; *Burton v. Goodspeed*, 69 Ill. 327; *National Surety Co. v. T. B. Townsend Brick & Contracting Co.*, 176 Ill. 156, 52 N. E. 938; *Pierpont v. Lanphere*, 104 Ill. App. 232; *Ellsworth v. Pomeroy*, 26 Ind. 158; *Price v. Alexander*, 2 G. Greene (Iowa) 427, 52 Am. Dec. 526; *Holbrook v. Oberne*, 56 Iowa, 324, 9 N. W. 291; *Porter v. Curtis*, 96 Iowa, 539, 65 N. W. 824; *Johnson v. Carter*, 120 Iowa, 355, 94 N. W. 850; *Shepard v. Pratt*, 16 Kan. 209; *Donley v. Hall*, 5 Bush (Ky.) 549; *Holden v. French*, 68 Me. 241; *Kerr v. Potter*, 6 Gill (Md.) 404; *Sangston v. Hack*, 52 Md. 173; *Reddington v. Lanahan*, 59 Md. 429; *Whiting v. Leakin*, 66 Md. 255, 7 Atl. 688; *Rowland v.*

ceased partner receiving, by way of annuity, a portion of the profits: ⁷⁶ a person who has loaned money to another engaged, or about to engage, in business, on a contract with him that

Long, 45 Md. 439; Taylor v. Terme, 3 Harr. & J. (Md.) 505; Holmes v. Old Colony R. Co., 5 Gray (Mass.) 58; Com. v. Bennett, 118 Mass. 443; Morrow v. Murphy, 120 Mich. 204, 79 N. W. 193, 80 N. W. 255; Morrison v. Cole, 30 Mich. 102; Stockman v. Mitchell, 109 Mich. 348, 67 N. W. 336; Waggoner v. First Nat. Bank, 43 Neb. 84, 61 N. W. 112; Day v. Stevens, 88 N. C. 83; Mauney v. Colt, 86 N. C. 463; Newman v. Bean, 21 N. H. 93; Eastman v. Clark, 53 N. H. 276; Stone v. West Jersey Ice Mfg. Co., 65 N. J. Law, 20, 46 Atl. 696; Mason v. Hackett, 4 Nev. 420; Richardson v. Hughitt, 76 N. Y. 55; Prouty v. Swift, 51 N. Y. 594; Leggett v. Hyde, 58 N. Y. 272, Burdick's Cases, 50; Cassidy v. Hall, 97 N. Y. 159; Hayward v. Barron (Com. Pl.), 19 N. Y. Supp. 383; Winne v. Brundage (Sup.), 40 N. Y. Supp. 225; Hunt v. McCabe, 40 Misc. (N. Y.) 461; McArthur v. Ladd, 5 Ohio, 514; Boston & Colorado Smelting Co. v. Smith, 13 R. I. 31; State v. Hunt (R. I.), 54 Atl. 937; Chapman v. Lipscomb, 18 S. C. 233; Polk v. Buchanan, 5 Sneed (Tenn.) 721, Burdick's Cases, 62; Buzard v. First Nat. Bank, 67 Tex. 83; Tex. & Pac. R. Co. v. Smissen, 31 Tex. Civ. App. 549, 73 S. W. 42; La Flex v. Burss, 77 Wis. 538, 46 N. W. 801; Sohns v. Sloteman, 85 Wis. 113, 55 N. W. 158; Bigelow v. Elliot, 1 Cliff. 28, Fed. Cas. No. 1,399; Ross v. Parkyns, L. R. 20 Eq. 331; Rawlinson v. Clarke, 15 Mees. & W. 292; In re Gibb's Estate, 157 Pa. 59, 27 Atl. 383. Compare Hackett v. Stanley, 115 N. Y. 625, 22 N. E. 745, Burdick's Cases, 57. Contra, Miller v. Hughes, 1 A. K. Marsh. (Ky.) 181; Taylor v. Terme, 3 Har. & J. (Md.) 506, overruled in Whiting v. Leakin, 66 Md. 255, 7 Atl. 688.

"The legal rule, that accepting a percentage of profits in compensation for services does not create a copartnership, is so well settled that it is scarcely necessary to repeat it here." Hayward v. Barron (Com. Pl.), 19 N. Y. Supp. 384, citing Cassidy v. Hall, 97 N. Y. 159; Conklin v. Tuthill, 10 N. Y. St. Rep. 624; Richardson v. Hughitt, 76 N. Y. 58; Salter v. Ham, 31 N. Y. 321; Curry v. Fowler, 87 N. Y. 33; Burnett v. Snyder, 76 N. Y. 344; Edwards v. Dooley, 13 N. Y. St. Rep. 602; De Cordova v. Powter, 8 N. Y. St. Rep. 431; Adams v. Morrison, 113 N. Y. 152, 20 N. E. 829; Burckle v. Eckhart, 3 N. Y. 138; Eager

⁷⁶ Waugh v. Carver, 2 H. Bl. 235, Burdick's Cases, 47, Mechem's Cases, 67; Jones v. Walker, 103 U. S. 444, Mechem's Cases, 391; Phillips v. Samuel, 76 Mo. 657. See, also, Pitkin v. Pitkin, 7 Conn. 307.

the lender shall receive a rate of interest varying with the profits, or a portion of the profits of the business, in lieu of interest; ⁷⁷ a person receiving a share of profits in lieu of rent

v. Crawford, 76 N. Y. 97. That the amount of one's compensation is uncertain, and depends upon the various contingencies of the business, does not make him any the less an agent. *Newman v. Bean*, 21 N. H. 93. "The law allowing agents to receive shares of profits as compensation for services is based upon grounds of public policy, because it constitutes an incentive to extra exertion, and does not infringe upon the rights of creditors, or the rules of public policy; since, if there are profits, the creditors get their pay, and are satisfied, and, if there are no profits, the agents get nothing." *Parker v. Canfield*, 37 Conn. 257. See, also, *Loomis v. Marshall*, 12 Conn. 69.

In Pennsylvania it is provided by statute that individuals and corporations may share profits with employees in lieu of wages, without creating a partnership either inter se or as to third persons. *Pep. & L. Pa. Dig. tit. "Partnership," § 17*. See, also, *Edwards v. Tracy*, 62 Pa. 374; *Dale v. Pierce*, 85 Pa. 474.

⁷⁷ *In re Young* [1896], 2 Q. B. Div. 484; *Cassidy v. Hall*, 97 N. Y. 159; *Meehan v. Valentine*, 145 U. S. 611, *Burdick's Cases*, 80, *Mechem's Cases*, 103; *Thillman v. Benton*, 82 Md. 64, 33 Atl. 485, *Burdick's Cases*, 85; *Leggett v. Hyde*, 58 N. Y. 272, *Burdick's Cases*, 50; *Richardson v. Hughitt*, 76 N. Y. 55; *Curry v. Fowler*, 87 N. Y. 33; *Jones v. Walker*, 103 U. S. 444, *Mechem's Cases*, 391; *Grace v. Smith*, 2 H. Bl. 998, *Burdick's Cases*, 45; *Boston & Colorado Smelting Co. v. Smith*, 13 R. I. 27; *Culley v. Edwards*, 44 Ark. 423; *Niehoff v. Dudley*, 40 Ill. 406; *Smith v. Vanderburg*, 46 Ill. 34; *Lintner v. Millikin*, 47 Ill. 178; *Cadenasso v. Antonelle*, 127 Cal. 382, 59 Pac. 765; *Hunter v. Conrad*, 18 Mont. 177, 44 Pac. 523; *Ellison v. Stuart*, 2 Pen. (Del.) 179, 43 Atl. 838; *Palliser v. Erhardt*, 46 App. Div. 222, 61 N. Y. Supp. 191; *Waggoner v. First Nat. Bank*, 48 Neb. 84, 61 N. W. 112; *Sheridan v. Medara*, 10 N. J. Eq. 477; *Jernee v. Simonson*, 58 N. J. Eq. 282, 43 Atl. 373. But see *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745, *Burdick's Cases*, 57.

"It [i. e., the profit-sharing rule] was soon relaxed in favor of agents or servants, who, it was held, might take a share of profits by way of compensation for their services without becoming quasi-partners. The English courts, however, refused to extend the exception to cover a loan of money, though, upon principle, it is impossible to discern any difference whether a portion of the profits goes to pay for services or for money contributed to the business. Mr. Lindley, in his excellent work on "Partnership," suggests that this difference

for the use of property, either real or personal.⁷⁸ This enumeration of applications is illustrative only, but it is believed that no modern case presents an inconsistent application.

of decision was owing to the statutes against usury, because, in many cases, a loan of money for a share of profits could only be upheld by regarding the lender as a partner." *Boston & Colorado Smelting Co. v. Smith*, 13 R. I. 31, citing *Lindl. Partn.* (3d ed.) 23-25. If a party is to receive profits in consideration of furnishing capital, he is clearly a partner; and he is a partner as to third persons, even though it should be stipulated that the capital so furnished should be regarded as a loan, and the party furnishing it a mere creditor. *Parker v. Canfield*, 37 Conn. 250. But see *Eastman v. Clark*, 53 N. H. 276.

In Pennsylvania, it is provided by statute that a share of profits may be taken in lieu of interest without creating a partnership, except so far as the money loaned is concerned, provided the agreement is in writing. If the agreement is not in writing, the lender will be liable as a partner to third persons. *Wessels v. Weiss*, 166 Pa. 490, 31 Atl. 247; *Hart v. Kelley*, 83 Pa. 286; *Eshleman v. Harnish*, 76 Pa. 97; *Irwin v. Bidwell*, 72 Pa. 244.

⁷⁸ *Hawley v. Dixon*, 7 U. C. Q. B. 218; *Great Western Ry. Co. v. Preston & B. Ry. Co.*, 17 U. C. Q. B. 477; *McDonnell v. Battle House Co.*, 67 Ala. 90; *Quackenbush v. Sawyer*, 54 Cal. 439, *Burdick's Cases*, 25; *Smith v. Vanderburg*, 46 Ill. 34; *Parker v. Fergus*, 43 Ill. 437; *Kelser v. State*, 58 Ind. 379; *Reed v. Murphy*, 2 G. Greene (Iowa) 574; *Thompson v. Snow*, 4 Me. 264; *Bridges v. Wm. C. Sprague & Pembroke Iron Co.*, 57 Me. 543; *La Mont v. Fullam*, 133 Mass. 583; *Holmes v. Old Colony R. Co.*, 5 Gray (Mass.) 58; *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, *Mechem's Cases*, 86; *Thayer v. Augustine*, 55 Mich. 187, 20 N. W. 898; *A. N. Kellogg Newspaper Co. v. Farrell*, 88 Mo. 594; *Perrine v. Hankinson*, 11 N. J. Law, 181; *Helmstreet v. Howland*, 5 Denio (N. Y.) 68; *Dake v. Butler*, 7 Misc. Rep. (N. Y.) 302; *Johnson v. Miller*, 16 Ohio, 431; *Brown v. Jaquette*, 94 Pa. 113; *Felton v. Deall*, 22 Vt. 170; *Tobias v. Blin*, 21 Vt. 544; *Garrett v. Republican Pub. Co.*, 61 Neb. 541, 85 N. W. 537. *Contra*, *Adams v. Carter*, 53 Ga. 160; *Hollifield v. White*, 52 Ga. 567.

"In *Holmes v. Old Colony R. Co.*, 5 Gray (Mass.) 58, it was held that a railroad corporation, by leasing a house owned by it to a party to be run as a hotel, the lessee to pay a certain sum annually, and half the net proceeds arising from keeping the house, and keep an account open for inspection by the corporation, and have free passage over the railroad for himself and all persons employed and all

Statutory Provisions.

In several jurisdictions, statutes exist expressly declaring that persons who share the profits of a business under one or more of the circumstances just enumerated are not, for that reason alone, partners.⁷⁰ But in jurisdictions where the re-

articles used in carrying on the hotel, did not thereby become a partner in the hotel business. The mere leasing of a hotel for a certain part of the net profits will not make the lessor a partner in the hotel business. This was decided in *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785. Nor does the renting of a building for a saloon, under an agreement to take half of the profits made out of the business done therein as rent, make the renter a partner in the business. *Thayer v. Augustine*, 55 Mich. 187, 20 N. W. 898. In another case, the plaintiff contributed towards the business his manufactory, shops, tools, implements, and machinery, and the land upon which they were situated. The defendants were to furnish a certain sum as capital, and labor to carry on the business. Defendants were to account to the plaintiff, at reasonable periods, for the proceeds of the business, or the profits thereof, and all daily transactions were to be entered on the books, to which plaintiff was to have access, and at stated periods an account was to be taken of the profits, which, after deducting the costs and expenses of running the works, and certain expenses, were to be divided between the parties. It was held that there was a community interest in the capital to carry on the business, and also a community of interest in the profits, and a partnership was thereby created. *Wood v. Beath*, 23 Wis. 254." *Webster v. Clark*, 34 Fla. 649, 16 So. 601. See, also, *May v. International Loan & Trust Co.*, 34 C. C. A. 448.

⁷⁰ In Pennsylvania, the statute provides that a person lending money, and receiving a share of the profits in lieu of interest, shall not be liable to third persons as a partner, except as to the money so loaned, provided the agreement is in writing, and he does not hold himself out as a partner, or induce credit to be given to the firm. It is also provided that an employee taking a share of profits in lieu of wages does not thereby become a partner, either really or as to third persons. *Pep. & L. Pa. Dig. tit. "Partnership," §§ 16, 17.* As *Cox v. Hickman* is not recognized in Pennsylvania, these statutes must be substantially complied with, or partnership liability will result.

In North Carolina, the statute provides that lessor of property, re-

sults of *Cox v. Hickman* have been fully adopted, such statutes would seem to be so far merely declaratory of the common law.⁸⁰

SAME—SHARING PROFITS AND LOSSES AS EVIDENCE OF INTENTION.

16. This subject can be conveniently considered under the following heads:

- (a) Sharing both profits and losses.
- (b) Sharing profits, with nothing said about losses.
- (c) Sharing profits, with stipulation against losses.
- (d) Sharing gross returns.
- (e) Sharing losses only.

17. Sharing Both Profits and Losses.—An agreement to share both the profits and the losses of a business is prima facie, but not conclusive, evidence of a partnership.

An agreement to share both the profits and losses of a business may be said to be the type of a partnership contract. Such an agreement has been thought to be conclusive evidence

ceiving a share of profits in lieu of rent, is not liable as a partner of the lessee. Code N. C., § 1744.

In England, some of the more common cases were specially provided for by Bovill's Act (28 & 29 Vict. c. 86), which, though repealed, is substantially re-enacted by the partnership act of 1890 (53 & 54 Vict. c. 39). By the latter act it is provided that persons sharing profits of a business under the circumstances which have been enumerated in the text do not, by reason only of such participation in profits, become partners in the business, or liable as such. Sellers of good will, and lenders of money, are, however, postponed to other creditors in case of bankruptcy.

⁸⁰ Pollock says that it is by no means certain that Bovill's Act really adds anything material to what has already been decided in *Cox v. Hickman*, but suggests that, whereas *Cox v. Hickman* decided

of a partnership, although the words "partner" or "partnership" do not occur in the agreement,⁸¹ and certainly, where such an agreement has been proved, the parties have usually been held to be partners.⁸² But an agreement to share profits and losses does not absolutely, and as a matter of law, create a partnership; and, if other circumstances in the transaction show that the parties did not intend (in the legal sense already explained) to create a partnership, none is created.⁸³

only that sharing profits is not conclusive evidence of partnership, and leaves it to be dealt with as a question of fact whether this is sufficient evidence in any case, the act goes a step further, and prevents it from being alone sufficient in any of the classes of cases dealt with. *Pol. Partn.*, art. 7.

⁸¹ *Lindl. Partn.*, p. 10; *Scott v. Campbell*, 30 Ala. 728. If two or more persons, without a special or express agreement to form a partnership, contribute to a fund to be invested, as occasion offers, in notes, stocks, and the like, and agree to share the gains and losses thereof, they thereby become partners. *Robinson v. Parker*, 11 App. Cas. (D. C.) 132.

⁸² *Morse v. Richmond*, 97 Ill. 303; *Smith v. Small*, 54 Barb. (N. Y.) 223; *Priest v. Chouteau*, 12 Mo. App. 252; *Chouteau v. Ralitt*, 20 Ohio, 132, 144; *Getchell v. Foster*, 106 Mass. 42; *Tyler v. Scott*, 45 Vt. 261, 267; *Pierce v. Shippee*, 90 Ill. 371; *Kuhn v. Newman*, 49 Iowa, 424; *Hendy v. March*, 75 Cal. 566; *Manhattan Brass & Mfg. Co. v. Sears*, 45 N. Y. 797; *Day v. Stevens*, 88 N. C. 83, 43 Am. Rep. 732. A contract creates a partnership when it provides for a sharing of profits and losses in a business, and imposes the duty of accounting between the parties. *Priest v. Chouteau*, 12 Mo. App. 252, affirmed in 85 Mo. 398. An agreement between two men to cut and put up hay together, sharing the expenses, losses, and profits, constitutes a partnership. *Robinson v. Compher*, 13 Colo. App. 343, 57 Pac. 754. In *Wills v. Simmonds*, 51 How. Prac. (N. Y.) 48, the creditors of a common debtor agreed to advance money for the purpose of carrying on such debtor's business, the profits or losses to be shared proportionately by the creditors. This was held to create a partnership. Compare this with the decision in *Cox v. Hickman*, 8 H. L. Cas. 268.

⁸³ *Grinton v. Strong*, 148 Ill. 587, 36 N. E. 559; *Leonard v. Sparks*, 109 La. 543; *Monroe v. Greenhoe*, 54 Mich. 9, 19 N. W. 569; *Osbrey v. Reimer*, 51 N. Y. 630; *Dwinel v. Stone*, 30 Me. 348, *Burdick's Cases*, 17; *Snell v. De Land*, 43 Ill. 323; *Clifton v. Howard*, 89 Mo. 192;

The true rule is that such an agreement is merely *prima facie* evidence of a partnership. This means that, if all that is known is that two or more persons are sharing the profits and losses of a business, the inference is that such persons are partners; but if there are any circumstances in the case which show that the participation in profits and losses is upon any other basis than as joint proprietors of the business, there is no room for this inference, and no partnership is created.⁸⁴

18. Sharing Profits, With Nothing Said About Losses.—
Partnership is *prima facie* the result of an agreement to share profits, though nothing is said about losses.

It has already been seen that the mere fact that certain persons share the profits of a business is not conclusive evidence that they are partners, because, as is frequently the case, such

1 S. W. 26, *Burdick's Cases*, 88; *Newberger v. Friede*, 23 Mo. App. 631; *McPhillips v. Fitzgerald*, 76 App. Div. (N. Y.) 15; *Morgan v. Stearns*, 41 Vt. 398; *Moore v. Williams*, 81 Tex. Civ. App. 287, 72 S. W. 222; *Bullen v. Sharp*, L. R. 1 C. P. 86, 125, *Burdick's Cases*, 71. "While the agreement . . . to share one-half the profits and losses might raise a presumption of partnership, yet if the parties actually meant that there was to be no partnership created, and so contracted, the presumption would be rebutted." *National Surety Co. v. T. B. Townsend Brick & Contracting Co.*, 176 Ill. 156, 52 N. E. 938, wherein it was held that an agreement between a contractor and a firm in his employ to share the profits and losses of the enterprise does not create a partnership as between the parties, where it is clear the arrangement was made to measure the compensation of the employees, and not with the intention of creating a partnership. In the case of a subpartnership, there is a sharing of the profits and losses of a business, and yet, as has been seen, the subpartner is not a partner in the principal firm. See *supra*, §§ 6, 7.

⁸⁴ *Morse v. Richmond*, 97 Ill. 303; *Clifton v. Howard*, 89 Mo. 192, 1 S. W. 26, *Burdick's Cases*, 88; *National Surety Co. v. T. B. Townsend Brick & Contracting Co.*, 176 Ill. 156, 52 N. E. 938. It is merely a presumption of law which prevails in the absence of controlling circumstances. *Pierpont v. Lamphere*, 140 Ill. App. 232; *Johnson v. Carter*, 120 Iowa, 355, 94 N. W. 850.

profits may be shared on some other basis than as common owners or joint proprietors of such profits. But where all that is known is that several persons are sharing the profits of a business, the most natural inference is that they share the profits because they jointly own them. Accordingly, proof of a participation in the profits of a business raises a *prima facie* presumption of the existence of a partnership.⁸⁵ This presumption is not conclusive, but may be overthrown by proof of other circumstances, showing that the profits are shared on some other basis than as common owners,⁸⁶ for example, in

⁸⁵ *Pooley v. Driver*, 5 Ch. Div. 458; *Meehan v. Valentine*, 145 U. S. 611, *Burdick's Cases*, 80, *Mechem's Cases*, 103; *Parchen v. Anderson*, 5 Mont. 433, 51 Am. Rep. 65; *Parker v. Canfield*, 37 Conn. 250; *Fourth Nat. Bank v. Altheimer*, 91 Mo. 190, 3 S. W. 858; *Lengle v. Smith*, 48 Mo. 276; *Lockwood v. Doane*, 107 Ill. 235; *Ryder v. Wilcox*, 103 Mass. 24, *Burdick's Cases*, 525; *In re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383; *Glore v. Dawson*, 106 Mo. App. 107, 80 S. W. 55; *Fechtelor v. Palm Bros. & Co. (C. C. A.)*, 133 Fed. 462. Participation in the profits of a business is *prima facie* strong evidence of a partnership in it. And this rule applies to a party who receives a sum equal to a certain share of the profits, as well as to a party receiving such share of profits by the name of profits. *Parker v. Canfield*, 37 Conn. 250.

⁸⁶ *Wild v. Davenport*, 48 N. J. Law, 129, 7 Atl. 295, *Burdick's Cases*, 77; *Lockwood v. Doane*, 107 Ill. 235; *Waggoner v. First Nat. Bank*, 43 Neb. 84, 61 N. W. 112; *In re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383. See, also, ante, § 10. Under the doctrine prevailing before the decision of *Cox v. Hickman*, profit sharing was conclusive proof of a partnership, at least as to third persons. See ante, § 9. But see *Parker v. Canfield*, 37 Conn. 250, commenting on effect of decisions before *Cox v. Hickman*.

"It is said (and about that there is no doubt) that the mere participation in profits *inter se* affords cogent evidence of partnership. But it is now settled by the cases of *Cox v. Hickman*, 8 H. L. Cas. 268, *Burdick's Cases*, 65; *Bullen v. Sharp*, L. R. 1 C. P. 86, and *Mollwo v. Court of Wards*, L. R. 4 P. C. 419, that although a right to participate in profits is a strong test of partnership, and there may be cases where, upon a simple participation in profits, there is a presumption, not of law, but of fact, that there is a partnership, yet whether the relation of partnership does or does not exist must de-

lieu of wages for services, rent of property, interest on money, and the like.⁸⁷ But in the absence of any such explanation as to the basis upon which the profits are shared, mere proof of profit-sharing is sufficient to establish the fact of partnership.⁸⁸ Where there is nothing to show a contrary intention, it will be presumed that losses were to be shared in the same proportion as the profits, and the case falls within the rule that an agreement to share both the profits and losses of a business is *prima facie* evidence of a partnership.⁸⁹

pend upon the whole contract between the parties, and that circumstance is not conclusive." *Ross v. Parkyns*, L. R. 20 Eq. 335.

⁸⁷ See ante, § 10.

⁸⁸ *Lockwood v. Doane*, 107 Ill. 235; *Ryder v. Wilcox*, 103 Mass. 24, *Burdick's Cases*, 525; *Cothran v. Marmaduke*, 60 Tex. 370; *Fourth Nat. Bank v. Althemier*, 91 Mo. 190, 3 S. W. 858; *Meehan v. Valentine*, 145 U. S. 611, *Burdick's Cases*, 80, *Mechem's Cases*, 103. See, also, cases cited *supra* in this section.

⁸⁹ *Oppenheimer v. Clemmons*, 18 Fed. 886; *Richards v. Grinnell*, 63 Iowa, 44, 18 N. W. 668; *Johnson v. Carter*, 120 Iowa, 355, 94 N. W. 850; *Illingworth v. Parker*, 62 Ill. App. 650; *Jones v. Murphy*, 93 Va. 214, 24 S. E. 825; *Cothran v. Marmaduke*, 60 Tex. 370; *Lengle v. Smith*, 48 Mo. 276; *Wilcox v. Dodge*, 12 Ill. App. 517. Where two persons engage in a joint venture—one to furnish capital, and the other skill and labor, and both to share the profits—it is a partnership, though there is no agreement as to sharing losses; the law presuming such agreement. *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355. "An agreement between two or more parties to engage jointly in the business of supplying a government post might constitute a 'partnership,' although the term were not used, nor any express mention made, in regard to profits or losses. If it were understood between the parties that there was to be a communion of profit, it would be a partnership. 'A communion of profit implies a communion of loss; for every man who has a share of profits of a trade ought also to bear his share of the loss.'" *Bloomfield v. Buchanan*, 13 Or. 108, 8 Pac. 912. It is not necessary that there should be an express stipulation to share profit and loss in order to constitute a partnership. If it were understood between the parties that there was to be a communion of profit, that would be a partnership. *Bloomfield v. Buchanan*, 13 Or. 108, 8 Pac. 912; *Manhattan Brass & Mfg. Co. v. Sears*, 45 N. Y. 797. In Iowa, it is held that a contract which

19. Sharing Profits, With Stipulation Against Losses.—Partnership is *prima facie* the result of an agreement to share profits, although community of loss is stipulated against.

Persons who agree to share the profits of a business are *prima facie* partners, although they stipulate that they will not be liable for losses beyond the sum which they engaged to subscribe.⁹⁰ It has been said that, in order to constitute a partnership, a community of both profits and losses is essential.⁹¹ But there appears to be nothing to prevent one or more partners from agreeing to indemnify the others against loss, or to prevent full effect from being given to a contract of partnership containing such a clause of indemnity.⁹² Lind-

does not provide for a sharing of losses, as well as profits, does not create a partnership. *Winter v. Pipher*, 96 Iowa, 17, 64 N. W. 663, *Burdick's Cases*, 90; *McBride v. Ricketts*, 98 Iowa, 539, 67 N. W. 410. But compare *Richards v. Grinnell*, *supra*.

⁹⁰ *Walden v. Sherburne*, 15 Johns. (N. Y.) 409; *Pollard v. Stanton*, 7 Ala. 761; *Clift v. Barrow*, 108 N. Y. 187, 15 N. E. 327, *Burdick's Cases*, 93. A partnership may exist, though one partner guaranties that the profits of the other partner shall amount to a certain sum. *Robbins v. Laswell*, 27 Ill. 365. If parties agree to share profits, they are partners as to such profits, although they do not agree to share in losses. *Id.*

⁹¹ *Mayrant v. Marston*, 67 Ala. 453; *Whitehill v. Shickle*, 43 Mo. 537; *Ruddick v. Otis*, 33 Iowa, 402; *Coope v. Eyre*, 1 H. Bl. 37, *Mechem's Cases*, 64; *Winter v. Pipher*, 96 Iowa, 17, 64 N. W. 663; *McBride v. Ricketts*, 98 Iowa, 539, 67 N. W. 410; *Pattison v. Blanchard*, 5 N. Y. 186; *Vanderburgh v. Hull*, 20 Wend. (N. Y.) 70; *Cummings v. Mills*, 1 Daly (N. Y.) 520. "It is well settled in this state that a mere participation in the profits of a business does not constitute a partnership as between the parties. There must be a sharing of the losses." *Porter v. Curtis*, 96 Iowa, 539, 65 N. W. 824, citing *Price v. Alexander*, 2 G. Greene (Iowa) 431; *Williams v. Soutter*, 7 Iowa, 445; *Munson v. Sears*, 12 Iowa, 178; *Holbrook v. Oberne*, 56 Iowa, 324, 9 N. W. 291; *Winter v. Pipher*, 96 Iowa, 17, 64 N. W. 663.

⁹² *Oppenheimer v. Clemmons*, 18 Fed. 888; *Bond v. Pittard*, 3 Mees & W. 357; *Gilpin v. Enderbey*, 5 Barn. & Ald. 954; *Fereday v. Hordern*, Jac. 144. Sharing the losses of adventure is not essential to

ley says that the true effect of such a stipulation is to entitle some of the partners to indemnity against losses in excess of the advances, but not against loss of the advances themselves, and that, if the loss of the advances is stipulated against, the contract becomes one of loan, and not of partnership.⁹³ It is often a very difficult matter to determine whether a person advancing money and sharing profits is to be considered a creditor or a partner. This can only be decided by a careful study of the whole agreement, with especial reference to what rights are conferred upon or taken from the person making the advances.⁹⁴ Thus, if, in addition to a right to an account and an inspection of the books of the borrower, the person making the advances reserves a right to control the business or the employment of the assets, or to wind up the business, he ceases to be a mere lender, and becomes, in effect, a partner.⁹⁵ A partner who has stipulated against any personal

a copartnership. If there is a community of interests in the profits, as such, of the business, and not by way of compensation for services rendered or capital loaned toward the prosecution of the business, it is sufficient to constitute a partnership. *Waggoner v. First Nat. Bank*, 43 Neb. 84, 61 N. W. 112.

⁹³ *Lindl. Partn.* p. 15. *Orvis v. Curtiss*, 12 Misc. 434, 33 N. Y. Supp. 589, but this case was reversed, and the contrary was squarely held, in 157 N. Y. 657.

⁹⁴ See *Mollwo v. Court of Wards*, L. R. 4 P. C. 419; *Pooley v. Driver*, 5 Ch. Div. 458; *Badeley v. Consolidated Bank*, 34 Ch. Div. 536.

⁹⁵ *Lindl. Partn.* p. 17; *Orvis v. Curtiss*, 12 Misc. 434, 157 N. Y. 657, 33 N. Y. Supp. 589; *Magovern v. Robertson*, 116 N. Y. 61, *Mechem's Cases*, 122; *Hackett v. Stanley*, 115 N. Y. 625, 14 Daly (N. Y.) 210, 22 N. E. 745, *Burdick's Cases*, 57; *Leggett v. Hyde*, 58 N. Y. 272, *Burdick's Cases*, 50; *Rosenfield v. Haight*, 53 Wis. 260, 10 N. W. 378; *Spaulding v. Stubbings*, 86 Wis. 255, 56 N. W. 469, *Mechem's Cases*, 117; *Waverly Nat. Bank v. Hall*, 150 Pa. 466, 24 Atl. 665; *Voorhees v. Jones*, 29 N. J. Law, 270. Community of interest in profits, not by way of compensation for services rendered or capital loaned, but profits, as such, a community of interest in the property the subject of the venture, and a community of power of management of such

liability has been held not liable to one who deals with the firm with notice of such limitation upon his liability;⁹⁶ but the better opinion would seem to be that all are primarily liable to a third person, because all are partners, and that the partner must seek his indemnity from his copartners.⁹⁷

20. Sharing Gross Returns.—Partnership is not the result of an agreement to share gross returns.

It has long been settled that an agreement to share gross returns of a joint venture does not create a partnership.⁹⁸ Even under the old doctrine that persons who shared profits were

property, are correct tests of partnership. *Waggoner v. First Nat. Bank*, 43 Neb. 84, 61 N. W. 112.

⁹⁶ *Bailey v. Clark*, 6 Pick. (Mass.) 372.

⁹⁷ *Pollard v. Stanton*, 7 Ala. 761; *Clift v. Barrow*, 108 N. Y. 187, 15 N. E. 327; *Everitt v. Chapman*, 6 Conn. 347; *Brown v. Leonard*, 2 Chit. 120; *Walden v. Sherburne*, 15 John. (N. Y.) 409; *Lindl. Partn.* p. 41; *Bond v. Pittard*, 3 Mees & W. 357; *Fereday v. Hordern*, Jac. 144; *Voorhees v. Jones*, 29 N. J. Law, 270. "One partner may expressly stipulate that he is not to share in losses, and such an agreement will be valid between the parties, but he cannot thus withdraw himself from his obligation, as a partner, to strangers." *Oppenheimer v. Clemmons*, 18 Fed. 888.

⁹⁸ *Blue v. Leathers*, 15 Ill. 31; *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785; *Merrick v. Gordon*, 20 N. Y. 93; *Champion v. Bostwick*, 18 Wend. (N. Y.) 175; *Everett v. Coe*, 5 Denio (N. Y.) 180; *Heimstreet v. Howland*, 5 Denio (N. Y.) 68; *Pattison v. Blanchard*, 5 N. Y. 186; *Putnam v. Wise*, 1 Hill (N. Y.) 234; *Day v. Stevens*, 88 N. C. 83, 43 Am. Rep. 732; *Brown v. Jaquette*, 94 Pa. 113, 39 Am. Rep. 770; *Ambler v. Bradley*, 6 Vt. 119; *Cedarburg v. Guernsey*, 12 S. D. 77, 80 N. W. 159; *Mason v. Potter*, 26 Vt. 722; *Oppenheimer v. Clemmons*, 18 Fed. 886; *Benjamin v. Porteus*, 2 H. Bl. 590; *Dry v. Boswell*, 1 Camp. 330; *Mair v. Glennie*, 4 Maule & S. 240; *Wilkinson v. Frasier*, 4 Esp. 182; *Heyhoe v. Burge*, 9 C. B. 431; *Eastman v. Clark*, 53 N. H. 276. Contra, *Jones v. McMichael*, 12 Rich. (S. C.) 176; *Allen v. Davis*, 13 Ark. 28; *Holifield v. White*, 52 Ga. 567; *Adams v. Carter*, 53 Ga. 160. A contract that a person furnishing logs to a saw mill shall receive as compensation therefor, either one-half of the lumber made from the logs, or a stipulated price per

liable to third persons as if they were partners, it was held that persons who merely divided gross returns did not incur any such liabilities.⁹⁹ In this connection, the term "gross profits," sometimes met with in the books, is used synonymously with "gross returns."¹⁰⁰

The real reason why an agreement to share the gross returns does not create a partnership is that such an agreement cannot possibly constitute the parties thereto joint proprietors

hundred feet for such half, does not create a partnership, for such person has no interest, either in the profits or losses of the business. *Thornton v. George*, 108 Ga. 9, 33 S. E. 633. To same effect is *Parker v. Fergus*, 43 Ill. 437.

⁹⁹ See cases cited in preceding note. Speaking of the distinction between agreements to share profits and agreements to share gross returns, Lindley says (page 9): "The reasonableness, however, of the above distinction, is very questionable, at least where there is any community of capital or common stock; and the rule itself is probably attributable less to the difference which exists between net profits and gross returns than to the doctrine which so long confused the whole law of partnership in this country, and according to which all persons who shared profits incurred liability as if they were really partners. When this doctrine was rife, the distinction between sharing net profits and gross profits (i. e., returns) had considerable practical value; but, as will be seen hereafter, the doctrine in question is now wholly exploded, and the distinction alluded to is of little importance."

"Whether a man is a partner or not depends upon the nature of his interest in the profits. The profits of a trade are included within the gross proceeds, and, if a man is interested as owner in the latter of these funds, he must be also in the former; for there is nothing in the mere deduction in the expenses of the business from its proceeds which affects, in any way, the kind of interest of those concerned therein. Hence, the question still must be, not whether a man share in gross or in net receipts, but what is the nature of his interest in either of these funds? If his interest is that of owner, then he is a partner; otherwise not." *Wheeler v. Farmer*, 38 Cal. 205.

¹⁰⁰ Profits are the excess of returns over advances. Therefore the terms "profits," "net profits," and "net returns" are all synonymous. The term "gross profits" is inaccurate. "Gross returns" is what is meant. See Lindl. Partn. p. 7

of the profits, which has been seen to be the one essential element of every true partnership. Such an agreement creates merely a debt between the parties, for the share may be claimed, even where there are no profits, but a loss instead. "Though the sum may come out of profits, if they are sufficient, it will nevertheless come out of somebody, though there be no profits. The fixed amount, which is independent of the success or failure of the business, betrays a stranger's interest, and not a principal's."¹⁰¹ Where, however, there is a joint business or common stock or capital, and a division of the product in kind, it has been held that a partnership is created.¹⁰²

Illustrations of Rule.

Perhaps the strongest illustration of the rule under consideration is afforded by those cases where co-owners of chattels agree to divide the earnings obtained by the use or employment thereof. Such an agreement does not constitute the co-owners partners.¹⁰³ Where two persons bought a circus, and

¹⁰¹ J. Pars. Partn. § 62. This excellent little book is not so widely known as its merits deserve. See, also, *Everett v. Coe*, 5 Denio (N. Y.) 180.

¹⁰² *Everitt v. Chapman*, 6 Conn. 347; *Jones v. McMichael*, 12 Rich. (S. C.) 176; *Stapleton v. King*, 33 Iowa, 28, 11 Am. Rep. 109; *Musler v. Trumbour*, 5 Wend. (N. Y.) 274.

¹⁰³ In *French v. Styrnig*, 2 C. B. (N. S.) 357, *Ames' Cas. Partn.* 41, the plaintiff and defendant were the common owners of a race horse. It was agreed that the plaintiff should keep, train and have the management of the horse; that thirty-five shillings a week should be allowed for the expenses of his keep; that the plaintiff should pay the expenses of entering the horse, and conveying him to the different races; and that one-half of the horse's keep and other expenses and his winnings should be equally divided between the plaintiff and the defendant. This agreement was held not to create a partnership. It was said to be no more a partnership than if two tenants in common of a house had agreed that one of them should have the general management, and provide funds for necessary repairs, and that the net rent should be divided between them equally.

one agreed to manage it, and divide the gross receipts with the other, no partnership was created.¹⁰⁴ A lessor of property for a proportion of the gross receipts is not a partner of the lessee.¹⁰⁵ So, where two persons were respectively the lessee and manager of a theater, and they shared the gross receipts equally, the manager paying the expenses out of his share, it was held that no partnership subsisted.¹⁰⁶ The cultivation of land for a share of the crops is not a partnership.¹⁰⁷ The crew of a whaling ship, who are to be paid by the owners a certain share of the oil brought home, are not partners with the owners.¹⁰⁸ A retiring partner, receiving, for his interest, a percentage upon the gross future sales of the firm, is not a partner in the new firm.¹⁰⁹ No partnership exists between the owner of a barge and a man who works it, and receives for his wages half the gross earnings.¹¹⁰ A contract to keep stock

¹⁰⁴ *Quackenbush v. Sawyer*, 54 Cal. 439, *Burdick's Cases*, 25.

¹⁰⁵ *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, *Mechem's Cases*, 86; *Helmstreet v. Howland*, 5 Denio (N. Y.) 68; *Knowlton v. Reed*, 38 Me. 246.

¹⁰⁶ *Lyon v. Knowles*, 3 Best & S. 556.

¹⁰⁷ *Taylor v. Bush*, 75 Ala. 432; *Gurr v. Martin*, 73 Ga. 528; *Blue v. Leathers*, 15 Ill. 31; *Putnam v. Wise*, 1 Hill (N. Y.) 234; *Mann v. Taylor*, 5 Heisk. (Tenn.) 267; *Brown v. Jaquette*, 94 Pa. 113. *Contra*, *Allen v. Davis*, 13 Ark. 28; *Hollifield v. White*, 52 Ga. 567; *Adams v. Carter*, 53 Ga. 160. Where the landlord furnishes the land, and teams and feed for them, and the tenant supplies the labor and provisions for the laborers, in the cultivation of a crop, the gross product to be divided between them, without any account of expenditures made by either, the agreement does not constitute an agricultural partnership. *Day v. Stevens*, 88 N. C. 83; *Parker v. Fergus*, 43 Ill. 437. But an agreement to carry on a farm, one furnishing the land, outfit and necessary money, the other furnishing laborers and superintending, half the money furnished to be repaid, and the profits to be divided between them, constitutes a partnership. *Reynolds v. Pool*, 84 N. C. 37, 37 Am. Rep. 607, *Burdick's Cases*, 30.

¹⁰⁸ *Wilkinson v. Frasier*, 4 Esp. 182; *Holden v. French*, 68 Me. 241.

¹⁰⁹ *Gibson v. Stone*, 43 Barb. (N. Y.) 285.

¹¹⁰ *Dry v. Boswell*, 1 Camp. 330. See, also, *Lowery v. Brooks*, 2 McCord (S. C.) 421.

for a share of the increase does not create a partnership.¹¹¹ Where connecting carriers have associated themselves under a contract for a division of the profits of the carriage in certain proportions, or of the receipts from it after deducting any of the expenses of the business, they become jointly liable as partners to third persons; but where the agreement is that each shall bear the expenses of his own routes, and that the gross receipts shall be divided in proportion to distance, or otherwise, they are partners neither *inter se* nor as to third persons, and incur no joint liability.¹¹²

21. Sharing Losses Only.—Partnership is not the result of an agreement to share losses or expenses only.

Where there is an agreement to share losses, but no agreement, express or implied, to share profits, no partnership is created. This is necessarily so, for, as has been seen, a community of ownership in the profits is the very essence of a partnership.¹¹³ Where the enterprise is not undertaken for profit, there is no partnership.¹¹⁴ Thus, where two connecting carriers agreed to bear jointly all losses to persons or goods

¹¹¹ Beckwith v. Talbot, 95 U. S. 289; Robinson v. Haas, 40 Cal. 474.

¹¹² Hutch. Car. (2d. Ed.) § 169; Hale, Bailm. & Carr. pp. 473-475; Bostwick v. Champion, 11 Wend. (N. Y.) 571, 18 Wend. (N. Y.) 175; Block v. Fitchburg R. Co., 139 Mass. 308, 1 N. E. 348; Gass v. New York P. & B. R. Co., 99 Mass. 220; Merrick v. Gordon, 20 N. Y. 98; Briggs v. Vanderbilt, 19 Barb. (N. Y.) 222; Insurance Co. v. Railroad Co., 104 U. S. 146; Post v. Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

¹¹³ Jones v. Howard, 53 Miss. 707; Moss v. Jerome, 10 Bosw. (N. Y.) 220; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Irvin v. Nashville, C. & St. L. R. Co., 92 Ill. 103, 34 Am. Rep. 116. But see Hendrick v. Gunn, 35 Ga. 234.

¹¹⁴ Thus, an arrangement between B. and C. for "mutually keeping house," by which C. is to pay the house rent and the butcher's bill, and B. is to pay the other bills for the family expenses, does not, as a matter of law, make B. and C. partners, or authorize C. to bind B. to third parties for the rent. Austin v. Thomson, 45 N. H. 113.

not traceable to either alone, they were not thereby made partners.¹¹⁵ So, where the joint owners of a horse agree that one of them shall keep it, the expense of so doing to be shared by both, no partnership is created.¹¹⁶ Persons who have agreed to share the costs of a test case in court are not partners.¹¹⁷

SAME—COMMON STOCK OR CAPITAL.

22. A community of interest in the stock or capital, by means of which profits are earned, is not essential to the existence of a partnership.

It is not essential to the existence of a partnership that there shall be any joint capital or stock. If several persons labor together for the sake of profit, and dividing that profit, they will not be any less partners because they labor with their own tools or property.¹¹⁸ A partnership may exist between persons, one of whom furnishes all the capital, and the other

¹¹⁵ *Irvin v. Nashville, C. & St. L. Ry. Co.*, 92 Ill. 103; *Aigen v. Boston & M. Railroad*, 132 Mass. 423.

¹¹⁶ *Oliver v. Gray*, 4 Ark. 425, *Burdick's Cases*, 16.

¹¹⁷ *Carter v. Carter*, 28 Ill. App. 340.

¹¹⁸ *Lindl. Partn.* p. 13, citing *Fromont v. Coupland*, 2 Bing. 170, wherein two persons who horsed a coach, and divided the profits, were held to be partners, although each found his own horses, and the other had no property in them. See, also, *Meyer v. Sharpe*, 5 Taunt. 74; *Smith v. Watson*, 2 Barn. & C. 401; *Gardiner v. Childs*, 8 Car. & P. 345; *Stevens v. Faucet*, 24 Ill. 483, and cases cited *infra*, this section. "It is not necessary to constitute a partnership, that there should be any property constituting the capital stock which shall be jointly owned by the partners; but the capital may consist in the mere use of property owned by the individual partners separately, and it is sufficient to constitute the relation that they have agreed to share the profits and losses arising from the use of property or skill, either separately or combined." *Bigelow v. Elliot*, 1 Cliff. 36. See, also, *Oppenheimer v. Clemmons*, 18 Fed. 888, *Fed. Cas. No. 1,399*.

merely services, the profits only being shared.¹¹⁹ But where a person is sharing the profits of a business, the fact that he has an interest in the capital or stock is a circumstance tending strongly to show that he is a joint proprietor of the business and its profits, and therefore a partner,—in fact, the conclusion of partnership is almost irresistible.¹²⁰

¹¹⁹ *Bucknam v. Barnum*, 15 Conn. 67; *Robbins v. Laswell*, 27 Ill. 365; *Lockwood v. Doane*, 107 Ill. 235; *Pierce v. Shippee*, 90 Ill. 371; *Kuhn v. Newman*, 49 Iowa, 424; *Ryder v. Wilcox*, 103 Mass. 24, *Burdick's Cases*, 525; *Mulhall v. Cheatham*, 1 Mo. App. 476; *Ruckman v. Decker*, 23 N. J. Eq. 283; *Hayes v. Vogel*, 14 Daly (N. Y.) 486; *Pooley v. Driver*, 5 Ch. Div. 458. "Whether each contributes money or labor, or both money and labor, or as in the present case, one finds money, and the other labor, still it is equally a partnership." *Miller v. Hughes*, 1 A. K. Marsh. (Ky.) 182. "The contract provides that plaintiff shall furnish the goods, and the defendant his time, and the profits and losses are to be shared equally. This is a very common and usual contract of partnership, and it must be held, we think, that these persons were partners, unless there is some other provision of the contract, of a controlling nature, which changes what is regarded as the established rule." *Kuhn v. Newman*, 49 Iowa, 428.

¹²⁰ *Webster v. Clark*, 34 Fla. 637; *Sankey v. Columbus Iron Works*, 44 Ga. 228; *Morse v. Richmond*, 97 Ill. 303; *Richards v. Grinnell*, 63 Iowa, 44, 18 N. W. 668; *Somerby v. Buntin*, 118 Mass. 279; *Bohrer v. Drake*, 33 Minn. 408, 23 N. W. 840; *Chase v. Barrett*, 4 Paige, Ch. (N. Y.) 148; *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745, *Burdick's Cases*, 57; *Magovern v. Robertson*, 116 N. Y. 61, 22 N. E. 398, *Mechem's Cases*, 122; *Mumford v. Nicholl*, 20 Johns. (N. Y.) 611; *Sawyer v. First Nat. Bank*, 114 N. C. 13, 18 S. E. 949; *Hulett v. Fairbanks*, 40 Ohio St. 233; *Credit Mobilier v. Com.*, 67 Pa. 233; *Jones v. McMichael*, 12 Rich. (S. C.) 176; *Cothran v. Marmaduke*, 60 Tex. 370; *Spaulding v. Stubbings*, 86 Wis. 255, 56 N. W. 469, *Mechem's Cases*, 117; *Meehan v. Valentine*, 145 U. S. 611, *Burdick's Cases*, 80, *Mechem's Cases*, 103; *Ward v. Thompson*, 22 How. (U. S.) 330. "Where it appears that there is a community of interest in the capital stock, and also a community of interest in the profit and loss, then it is clear that an actual partnership exists between the parties." *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370. Where one party holds title to all the property used in the conduct of a business and has the exclusive possession and control of both the property and the

QUESTIONS OF LAW AND FACT.

23. The existence of a partnership is a mixed question of law and fact.

Whether or not the relation of partnership exists between two or more persons with respect to a given matter is a mixed question of law and fact.¹²¹ Where there is no controversy as to the facts, as where the question turns upon the construction of a written agreement, or where the facts have been separately found in a special verdict, the court may determine whether or not a partnership exists as a matter of law.¹²²

business, but, by an agreement, contracts to share profits with another, the agreement does not, in the absence of other proof of an intention to be partners, constitute, *inter sese*, a partnership. It is only a contract for sharing of profits. *Jernee v. Simonson*, 58 N. J. Eq. 282, 43 Atl. 370.

¹²¹ *Thompson v. First Nat. Bank*, 111 U. S. 529, *Burdick's Cases*, 96; *Kingsbury v. Tharp*, 61 Mich. 216, 28 N. W. 74. And see the cases cited in the two following notes. "What may constitute the legal relation of partnership between two or more persons in a given matter is a question of both fact and law." *Robinson v. Parker*, 11 App. Cas. (D. C.) 140. "What constitutes a partnership is a question of law. Whether a partnership, in the legal sense, exists, is a question of fact." *Ellison v. Stuart* (Del. Super.), 43 Atl. 838.

¹²² *Chisholm v. Cowles*, 42 Ala. 179; *Morgan v. Farrel*, 58 Conn. 413, 20 Atl. 614; *Everitt v. Chapman*, 6 Conn. 347; *Doggett v. Jordan*, 2 Fla. 541; *Lintner v. Millikin*, 47 Ill. 178; *Kingsbury v. Tharp*, 61 Mich. 216, 28 N. W. 74; *Cumpston v. McNair*, 1 Wend. (N. Y.) 457; *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429; *Boston & Colorado Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3; *May v. International Loan & Trust Co.*, 34 C. C. A. 450; *Waggoner v. First Nat. Bank*, 43 Neb. 84, 61 N. W. 112; *Rider v. Hammell*, 63 Kan. 733, 66 Pac. 1026. The rule is well settled that the construction of contracts, written or verbal, rests exclusively with the court, and they cannot be expounded by witnesses. *Lintner v. Millikin*, 47 Ill. 178. Where the agreement under which a business arrangement is carried on, and which is claimed to be a partnership, is in writing, and free from ambiguity or doubt, its legal effect must be determined as a matter of law, and the intention of the parties gathered therefrom; but if

Where the facts are not admitted, and a special verdict finding the facts only is not demanded, the existence of a partnership is to be determined by the jury under proper instructions from the court as to what facts, if found, will constitute a partnership.¹²³

CONTRACTS FOR FUTURE PARTNERSHIPS.

24. "Partnership is not the result of an agreement to share profits so long as anything remains to be done before the right to share them accrues."¹²⁴

Persons who have entered into a contract to become partners at some future time, or upon the happening of some future contingency, do not become partners until the agreed time has

the terms employed leave the true meaning in doubt, the construction put upon the contract by the parties thereto may be looked to in determining its legal effect. *Webster v. Clark*, 34 Fla. 637, 16 So. 601. In construing a contract with reference to whether or not it creates a partnership, a federal court is not bound to follow state decisions, but will exercise its own independent judgment. *Bancroft v. Hambly*, 94 Fed. 975, 36 C. C. A. 595.

¹²³ *McGrew v. Walker*, 17 Ala. 824; *Pardridge v. Ryan*, 14 Ill. App. 598; *Chamberlain v. Jackson*, 44 Mich. 320; *Densmore v. Mathews*, 58 Mich. 616, 26 N. W. 146; *McDonald v. Matney*, 82 Mo. 358; *Wagoner v. First Nat. Bank*, 43 Neb. 84, 61 N. W. 112; *Chase v. Stevens*, 19 N. H. 465; *Seabury v. Bolles*, 51 N. J. Law, 103, 16 Atl. 54; *Butler v. Finck*, 21 Hun (N. Y.) 210; *Meridan Nat. Bank v. Gallaudet*, 120 N. Y. 298, 24 N. E. 994; *McDuffie v. Bartlett*, 3 Pa. 317; *Spencer v. Jones*, 92 Tex. 518. "The plaintiff also contends that, inasmuch as participation in profits, if not conclusive, it at least prima facie evidence of partnership, it is for the jury to say whether the defendants are partners or not. This may be so if there is testimony, outside the contract and its execution, going to show the existence of a partnership. But if there is no such outside testimony—if all that the members of the firm of Mason, Chapin & Co. have done is to carry the contract into effect according to its terms—then the question is

¹²⁴ *Lindl. Partn.* p. 20.

arrived or the contingency has happened.¹²⁵ An executory contract does not create a partnership. The contract must be executed, and the partnership actually "launched," before the relation will arise.¹²⁶ Even after the arrival of the stipu-

wholly for the court; for nothing done in execution of the contract could create a partnership unless the contract is itself a contract for a partnership, and whether it is or not, it being a writing, is simply a question of legal construction." *Boston & Colorado Smelting Co. v. Smith*, 13 R. I. 34.

¹²⁵ *Lindl. Partn.* p. 20. See, also, *Snodgrass v. Reynolds*, 79 Ala. 452; *Doyle v. Bailey*, 75 Ill. 418; *Wilson v. Campbell*, 10 Ill. 383; *Sallors v. Nixon-Jones Printing Co.*, 20 Ill. App. 509; *Handlin v. Davis*, 81 Ky. 34; *Hall v. Edson*, 40 Mich. 651; *Dow v. State Bank of Sleepy Eye*, 88 Minn. 355, 93 N. W. 121; *Brink v. New Amsterdam Fire Ins. Co.*, 5 Rob. (N. Y.) 104; *Latta v. Kilbourn*, 150 U. S. 546. *Burdick's Cases*, 503, *Mechem's Cases*, 212. "There is, of course, an essential difference between a mere proposition to form a partnership, and its actual constitution." *Atkins v. Hunt*, 14 N. H. 205.

¹²⁶ In *Meagher v. Reed*, 14 Colo. 335, 24 Pac. 681, the court said: "A marked distinction exists in law between an agreement to enter into the copartnership relation at a future day and a copartnership actually consummated. It is an elementary principle that a partnership in fact cannot be predicated upon an agreement to enter into a copartnership at a future day unless it be shown that such agreement was actually consummated. In the language of the text-books, the partnership must be 'launched.' To constitute the relation, therefore, the agreement between the parties must be an executed agreement. So long as it remains executory, the partnership is inchoate, not having been called into being by the concerted action necessary under the partnership agreement. It is undoubtedly true that a partnership in praesenti may be constituted by an agreement if it appears that such was the intention of the parties. But where it expressly appears that the arrangement is contingent, or is to take effect at a future day, it is well settled that the relation of partners does not exist, and that, if one or more of them refuse to perform the agreement, there is no remedy between the parties except a suit in equity for specific performance, or an action at law for the recovery of damages, should any be sustained." See, also, *Wilson v. Campbell*, 10 Ill. 383. A subscription to shares is but an act or declaration of the subscriber to become a partner, and is executory only. *Hedge's Appeal*, 63 Pa. 273.

Inter se
(Murray & Co.)

lated time, the parties are not necessarily partners, and in fact they are not partners unless the partnership is launched.¹²⁷ Any act, the performance of which is made a condition precedent to the formation of the partnership, must be performed before a partnership will be held to exist,¹²⁸ though of course it is competent for the parties themselves to waive conditions precedent; and such conditions are waived where the parties actually "launch" the partnership without waiting for performance.¹²⁹

It is often difficult to determine whether the intention of the parties was to create a present partnership, or only to stipulate for a partnership in the future. "The test, however, is to ascertain, from the terms of the agreement itself, whether any time has to elapse, or any act remains to be done, before the right to share profits accrues, for, if there is, the parties will not be partners until such time has elapsed or act

¹²⁷ *Wilson v. Campbell*, 10 Ill. 383; *Doyle v. Bailey*, 75 Ill. 418; *Gray v. Gibson*, 6 Mich. 300. See, also, preceding note. Where the partnership articles are signed, and an attempt is made, as a firm, to purchase goods on credit, the partnership is launched, although the partners afterwards discontinue it because of inability to obtain goods on credit. *Thurston v. Perkins*, 7 Mo. 29. In *Battley v. Lewis*, 1 Man. & G. 155, the parties actually commenced business on the day named, and it was wholly immaterial, as regarded the question before the court, what the terms of the partnership were. See *Lindl. Partn.* p. 23.

¹²⁸ *Johnston v. Eichelberger*, 13 Fla. 230; *Metcalf v. Redman*, 43 Ill. 264; *Hobart v. Ballard*, 31 Iowa, 521; *Haskins v. Burr*, 106 Mass. 48; *Holle v. York*, 27 Wis. 209.

¹²⁹ *Pierce v. Whitney*, 39 Ala. 172; *Johnston v. Eichelberger*, 13 Fla. 230; *Palmer v. Tyler*, 15 Minn. 106; *Hartman v. Woehr*, 18 N. J. Eq. 383; *McStea v. Matthews*, 50 N. Y. 166; *Cook v. Carpenter*, 34 Vt. 121. Where all the proposed partners have not signed the partnership articles, but those who have signed proceed to act as partners without waiting for the signature of the others, the persons so acting are partners *inter se*. *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 562.

has been performed.”¹³⁰ The real intention of the parties is the controlling consideration.¹³¹

A contract for a future partnership is annulled by the death of a party while the contract is yet executory.^{131a}

Illustrations.

One who has stipulated for an option to become a partner in a certain business is not a partner until he has exercised his option and elected to become a partner.¹³² Where it is the intention of the parties not to be partners until they have signed formal articles of partnership, they are not partners until they have signed such articles.¹³³ But unless the sign-

¹³⁰ Lindl. Partn. p. 20. Where it is provided that the shares of a joint-stock association may be transferred only on consent of the directors, a purchaser of shares is not a partner until such consent has been given. *Kingman v. Spurr*, 7 Pick. (Mass.) 235. See, also, *Perring v. Home*, 4 Bing. 28. One who, upon the repayment of certain money, advanced by him to the lessee of a music hall, secured by a mortgage of the lease and fixtures of the music hall, is to become a part owner in the business of the hall, does not, prior to such repayment, occupy the position of a partner in the business, and become liable for advances made to the enterprise by a third party. *McLeod v. Miner*, 38 App. Div. (N. Y.) 115.

¹³¹ *Gill v. Kuhn*, 6 Serg. & R. (Pa.) 333. See, generally, *supra*, § 13, “Intention the Real Test.” Where the contract states that the parties thereto “have entered” into a partnership, and no time is stated at which the partnership shall commence, it commences at once. *Ingraham v. Foster*, 31 Ala. 123.

^{131a} *Dow v. State Bank of Sleepy Eye*, 88 Minn. 355, 93 N. W. 121. And see *In re Hoagland's Estate*, 51 App. Div. 347, 64 N. Y. Supp. 920.

¹³² *Morrill v. Spurr*, 143 Mass. 257; *Irwin v. Bidwell*, 72 Pa. 244; *Ex parte Davis*, 4 De Gex, J. & S. 523; *Gabriel v. Evill*, 9 Mees & W. 297; *Howell v. Brodie*, 6 Bing. N. C. 44. An option to elect not to be a partner is valid, at least between the parties. *Bidwell v. Madison*, 10 Minn. 13.

¹³³ *Martin v. Baird*, 175 Pa. 540, 34 Atl. 809. In *Baldwin v. Burrows*, 47 N. Y. 199, several persons purchased goods in common, with the intention of subsequently forming a partnership in regard to

ing of articles was intended to be a condition precedent to the existence of a partnership, the parties may be partners, although they in fact contemplated signing formal articles, but did not do so.¹³⁴ Signing partnership articles, like any other condition precedent, may be waived by actually launching the partnership without waiting for performance.¹³⁵

Good Faith Required.

The agreement for a future partnership must be such, *bona fide*, for if it is a mere colorable device for creating a partnership, and at the same time concealing it, so as to avoid partnership liability, it will be held to create a partnership.¹³⁶

ASSOCIATIONS NOT FOR PROFIT.

25. Societies and clubs, the object of which is not to share profits, are not partnerships, nor are their members, as such, liable for each other's acts.

Where the object of an association is not to share profits, it is clearly not a partnership,¹³⁷ because, as has been seen, the essential element and ultimate test of a partnership is an agreement to share the profits of a business as common own-

such goods, but without any present contract for the sale of the goods and a division of the profits. It was held that until the partnership agreement was actually made, no partnership existed between the joint purchasers, but that they were merely tenants in common of the goods.

¹³⁴ Wood v. Cullen, 13 Minn. 394; Hubbard v. Matthews, 54 N. Y. 43, 47; Battley v. Lewis, 1 Man. & G. 155.

¹³⁵ See Battley v. Lewis, 1 Man. & G. 155, and remarks of Lindley (page 23) thereon. See, also, *supra*, this section.

¹³⁶ Courtenay v. Wagstaff, 16 C. B. (N. S.) 110, per Williams, J., page 131.

¹³⁷ "It is a mere misuse of words to call such associations partnerships." Lindl. Partn. p. 50.

ers.¹³⁸ The members of such associations are only liable for their own personal acts, or for the acts of their authorized agents.¹³⁹ "And the agency must be made out by the person who relies on it, for none is implied by the mere fact of association."¹⁴⁰ Thus, the members of a Young Men's Christian Association, Masonic lodge, or other similar society or club, are not partners.¹⁴¹ So, co-operative stores which sell only to their members are not partnerships, but where they sell to outsiders they are partners.¹⁴²

¹³⁸ An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term. *Lindl. Partn.* p. 2; *Mollwo v. Court of Wards*, L. R. 4 P. C. 436; *Reg. v. Robson*, 16 Q. B. Div. 137. See ante, §§ 14, 15.

¹³⁹ *Burt v. Lathrop*, 52 Mich. 106, 17 N. W. 716, *Mechem's Cases*, 4; *Eichbaum v. Irons*, 6 Watts & S. (Pa.) 67.

¹⁴⁰ *Lindl. Partn.* p. 50. See, also, *Richmond v. Judy*, 6 Mo. App. 465; *Ash v. Guile*, 97 Pa. 493, *Burdick's Cases*, 30; *Sizer v. Daniels*, 66 Barb. 426; *Fleming v. Hector*, 2 Mees & W. 172; *Burls v. Smith*, 7 Bing. 705.

¹⁴¹ *Woodward v. Cowing*, 41 Me. 9; *Richmond v. Judy*, 6 Mo. App. 465; *Lafond v. Deems*, 81 N. Y. 507; *Ash v. Guile*, 97 Pa. 493, *Burdick's Cases*, 30; *Caldicott v. Griffiths*, 8 Exch. 898; *Fleming v. Hector*, 2 Mees & W. 172; *Reg. v. Robson*, 16 Q. B. Div. 137. Organization for religious and social purposes, the members living as one family. *Teed v. Parsons*, 202 Ill. 455, 66 N. E. 1044. Such societies have, however, been called "partnerships." See *Lloyd v. Loaring*, 6 Ves. 773; *Silver v. Barnes*, 6 Bing N. C. 180; *Beaumont v. Meredith*, 3 Ves. & B. 180. An association, each member of which agrees in writing to pay the sum subscribed by him for the purpose of building a meeting house, which, when completed, is to be the property of the subscribers in the proportions of the amounts invested in it by them respectively, is not a partnership. *Woodward v. Cowing*, 41 Me. 9. Artificial business organizations in Ohio, except clubs and organizations not for profit, are either corporations or partnerships. There is nothing intermediate. *Wehrman v. McFarland*, 9 Ohio Dec. 400.

¹⁴² *Hodgson v. Baldwin*, 65 Ill. 532; *Atkins v. Hunt*, 14 N. H. 205, *Mechem's Cases*, 49. See, generally, *Henry v. Jackson*, 37 Vt. 431.

CO-OWNERSHIP DISTINGUISHED.

26. The common ownership of property does not, of itself, create any partnership between the owners. But if they employ the common property in a business, and share the profits as distinguished from the gross returns, they are partners.

Although the incidents of partnership are different in many respects from the incidents of co-ownership,¹⁴³ it is nevertheless often a very difficult question to determine which of the two relations exist, for this question must be determined be-

¹⁴³ Speaking generally, and excluding all exceptional cases, the principal differences between co-ownership and partnership may be stated as follows: (1) Co-ownership is not necessarily the result of agreement. Partnership is. (2) Co-ownership does not necessarily involve community of profit or of loss. Partnership does. (3) One co-owner can, without the consent of the others, transfer his interest to a stranger, so as to put him in the same position, as regards the other owners, as the transferor himself was before the transfer. A partner cannot do this. (4) One co-owner is not, as such, the agent, real or implied, of the others. A partner is. (5) One co-owner has no lien on the thing owned in common for outlays and expenses, nor for what may be due from the others as their share of a common debt. A partner has. (6) One co-owner of land is entitled to have it divided between himself and co-owners, but not (except by virtue of a recent statute) to have it sold against their consent. A partner has no right to partition in specie, but is entitled, on a dissolution, to have the partnership property, whether land or not, sold, and the proceeds divided. (7) As between the real and personal representatives of a deceased co-owner of freehold land, the equitable as well as the legal interest in his share is real estate, whilst, as between the real and personal representatives of a deceased partner, the equitable interest in his share of partnership freehold property is treated as personal estate, although the legal interest in it is real estate. (8) Co-ownership not necessarily existing for the sake of gain, and partnership existing for no other purpose, the remedies, by way of account and otherwise, which one co-owner has against the others, are in many important respects differ-

fore it is known which set of incidents attach. If two persons purchase property to hold jointly or in common, they are co-owners, and not partners, unless that was their intention.¹⁴⁴ Moreover, there may be an agreement as to the management and use of the common property, and the application of the produce or gains derived from it, without any partnership arising.¹⁴⁵ If goods are purchased for resale under an agreement to divide the profits from the transaction, the purchasers are partners.¹⁴⁶ But if the goods are not purchased for resale, but for the purpose of dividing the goods themselves between the purchasers, there is no partnership.¹⁴⁷ "If each

ent from, and less extensive than, those which one partner has against his copartners." Lindl. Partn. p. 58.

¹⁴⁴ *Illiff v. Brazill*, 27 Iowa, 131; *Thurston v. Horton*, 16 Gray (Mass.) 274; *State Bank v. O. S. Kelley Co.*, 47 Neb. 678, 66 N. W. 619; *Butler Sav. Bank v. Osborne*, 159 Pa. 10, 28 Atl. 163. The joint purchase of property by several does not of itself constitute a partnership. *Breard v. Blanks*, 51 La. Ann. 1507, 26 So. 618.

¹⁴⁵ *French v. Stryling*, 20 C. B. (N. S.) 357, 366, *Burdick's Cases*, 22; *Pillsbury v. Pillsbury*, 20 N. H. 90; *Woodward v. Cowing*, 41 Me. 9; *Sargent v. Downey*, 45 Wis. 498.

¹⁴⁶ *Raid v. Hollinshead*, 4 Barn. & C. 867. See *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429. Where several parties unite in the purchase of real estate, not as a permanent investment, but as a speculation, and with a view of selling the same for profit, and there is a community of ownership of the property, community of power in carrying on the enterprise, and community of interest in the profits and losses arising from the same, it will ordinarily be treated as a partnership. *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484. If two persons buy a horse, each paying one-half of the purchase money, under an agreement that either of them having possession of the horse shall provide for his keeping, without cost to the other, and that each shall offer the horse for sale and endeavor to procure a purchaser at a profit over his cost, but that neither shall sell the horse without the concurrence of the other, they are tenants in common of the horse, and not partners. *Goell v. Morse*, 126 Mass. 480, *Burdick's Cases*, 23.

¹⁴⁷ *Coope v. Eyre*, 1 H. Bl. 37; *Hoare v. Dawes*, 1 Doug. 371; *Gibson v. Lupton*, 9 Bing. 297.

owner does nothing more than take his share of the gross returns obtained by the use of the common property, partnership is not the result.¹⁴⁸ On the other hand, if the owners convert those returns into money, bring that money into a common stock, defray out of it the expenses of obtaining the returns, and then divide the net profits, partnership is created in the profits, if not also in the property which yields them."¹⁴⁹ There may be co-ownership without partnership in the property itself, together with a real partnership in the business of managing it for the common benefit.¹⁵⁰

¹⁴⁸ *Gilman v. Cunningham*, 42 Me. 98; *Thurston v. Horton*, 16 Gray (Mass.) 274; *Chase v. Stevens*, 19 N. H. 465; *Butler Sav. Bank v. Osborne*, 159 Pa. 10, 28 Atl. 163. See *supra*, § 20, "Sharing Gross Returns." Tenants in common engaged in the use, employment, and development of their common property will be presumed, in the absence of proof of a contract of partnership, to continue to be tenants in common, and not partners. *Dunham v. Loverock*, 158 Pa. 197, 27 Atl. 990, *Mechem's Cases*, 6; *Butler Sav. Bank v. Osborne*, 159 Pa. 10, 28 Atl. 163. The several owners of a vessel are tenants in common, and not partners. *Coursin's Appeal*, 79 Pa. 20; *Macy v. DeWolf*, 3 Woodb. & M. 193, Fed. Cas. No. 8,933; *Helme v. Smith*, 7 Bing. 709, *Burdick's Cases*, 21. But they may be partners. *Campbell v. Mullett*, 2 Swanst. 551; *Hopkins v. Forsyth*, 14 Pa. 34; *Phillips v. Purington*, 15 Me. 425; *Ward v. Bodeman*, 1 Mo. App. 272.

¹⁴⁹ *Lindl. Partn.* p. 53. But see *French v. Styring*, 2 C. B. (N. S.) 355, *Ames' Cas. Partn.* 41, *Burdick's Cases*, 22, wherein *Willis, J.*, said that if two tenants in common of a house agreed that one of them should have the general management and provide funds for necessary repairs, and that the net rent should be divided between them, no partnership would be created. Where *N.* purchased from *A.*, who owned a stallion jointly with *B.*, his half interest in the use of the stallion for a certain season, and subsequently entered into a contract with *B.* to stand the horse in partnership, *N.* to pay all expenses, and to reimburse himself out of moneys collected for the services of the horse, the profits, if any, to be divided equally between them, there was a partnership. *Smith v. Brannon*, 22 Ky. L. R. 178, 51 S. W. 178.

¹⁵⁰ Per *Cockburn, C. J.*, in *French v. Styring*, 2 C. B. (N. S.) 355. *Burdick's Cases*, 22; *Campbell v. Mullett*, 2 Swanst. 551. See, also, *Thurston v. Horton*, 16 Gray (Mass.) 274. "Part owners of a ship

CORPORATIONS DISTINGUISHED.

27. Corporations are distinguished from partnerships principally in two particulars—

- (a) Corporations are organized under a franchise from the state, while partnerships are not, and
- (b) Corporations are legal entities while partnerships are not.

“Both partnerships and private corporations are conventional, so far as the members are concerned. The difference consists in this: The former are authorized by the general law among natural persons exercising their ordinary powers; the latter by a special authority, usually, if not necessarily, emanating from the legislature, and conferring extraordinary privileges.”¹⁵¹ But the most important distinction is that a corporation is recognized as a legal entity, or artificial person, separate and distinct from its members or stockholders, while, as will be seen, a partnership is not so regarded.¹⁵² As a consequence of this doctrine, the continued existence of the corporate entity is not affected by changes in its membership. But a partnership is absolutely dissolved by any change in the members composing it.¹⁵³ The rights and obligations of the corporation belong to the fictitious person, and not to the stockholders, and can not be exercised or enforced directly by or

do not, by simply using it in a joint enterprise, become partners as to the ship.’ Civ. Code, § 2396. But the use of a ship is distinct from the ship itself, and there may be a partnership in the use or earnings, although, as to the vessel itself, the parties are tenants in common.” *Hendy v. March*, 75 Cal. 569, 17 Pac. 702, citing *Merritt v. Walsh*, 32 N. Y. 689; *Bulfinch v. Winchenbach*, 3 Allen (Mass.) 161; *Mumford v. Nicholl*, 20 Johns. (N. Y.) 633; *Hinton v. Law*, 10 Mo. 701.

¹⁵¹ Per Cowen, J., in *Thomas v. Dakin*, 22 Wend. (N. Y.) 109.

¹⁵² See post, c. 4, “Firm as an Entity.”

¹⁵³ See post, § 143.

against the stockholders. But the rights and liabilities of a partnership are the rights and liabilities of the individual partners, and are enforceable by or against them individually.¹⁵⁴ Thus, the profits, and in fact all the property of the corporation, belongs to the corporation, and not to the stockholders.¹⁵⁵ But the profits and property of a partnership belong to the partners.¹⁵⁶ And the rule is the same where the stockholders are all corporations who form another corporation for co-operative action.^{156a}

PROMOTERS OF CORPORATIONS OR JOINT-STOCK COMPANIES.

- 28. Persons associated for the purpose of forming a corporation or a joint-stock company are not partners.**

Corporations.

Promoters of corporations are not partners, because they have not agreed to share the profits of a business as common

¹⁵⁴ Lindl. Partn. p. 5. See, also, post, c. 4, "Firm as an Entity," and c. 10, "Actions." The corporation, and not its stockholders, must bring trover or replevin for its property. *Tomlinson v. Bricklayers' Union No. 1*, 87 Ind. 308; *Button v. Hoffman*, 61 Wis. 20, 20 N. W. 667.

¹⁵⁵ *Queen v. Arnaud*, 16 L. J. 2 B. 50, 1 Cum. Cas. Corp. 30. The stockholders have no power to sell or convey corporate property. This must be done in the corporate name. *Wheelock v. Moulton*, 15 Vt. 519; *Humphreys v. McKissock*, 140 U. S. 304. A person owning all the stock of a corporation has not such an equitable estate in its realty as authorizes him to convey it in his own name. *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 34 S. W. 209.

¹⁵⁶ See post, c. 4, "Firm as an Entity," and c. 7, "Partnership Property."

^{156a} The ordinary contract between a union depot corporation and several railroad companies holding the stock of the depot company and making joint use of the depot facilities does not create a partnership. *Brady v. Chicago & G. W. R. Co. (C. C. A.)* 114 Fed. 106, 57 L. R. A. 712.

owners. If there can be said to be any agreement to share profits, it is to do so as stockholders. The ownership of the profits, when earned, will be in the corporation until distributed as dividends. So, also, the agreement between promoters is for a future relation, and, upon principles just explained, such a contract does not create a present partnership.¹⁵⁷

Joint-Stock Companies.

Persons associated for the purpose of forming a joint-stock company are not partners,¹⁵⁸ although, as will be seen later, joint-stock companies are a species of partnership.¹⁵⁹ The obvious reason is that the contract between them is simply one for a future partnership, which, as has been seen, does not create a present partnership.¹⁶⁰

¹⁵⁷ *Lindl. Partn.* p. 23; *Reynell v. Lewis*, 15 Mees. & W. 517, *Burdick's Cases*, 33; *Capper's Case*, 1 Sim. (N. S.) 178; *Mosier v. Parry*, 60 Ohio St. 388, 54 N. E. 364; *Ryland v. Hollinger* (C. C. A.), 117 Fed. 216. Persons who own and conduct a business jointly are partners; and though they contemplate a speedy incorporation and express that intent in their contract, they are, in the meantime, partners. *Bancroft v. Hambly*, 36 C. C. A. 601.

¹⁵⁸ *West Point Foundry Ass'n v. Brown*, 3 Edw. Ch. N. Y. 284; *Lindl. Partn.* p. 24, citing *Wood v. Duke of Argyll*, 6 Man. & G. 928; *Hamilton v. Smith*, 5 Jur. (N. S.) 32; *Hutton v. Thompson*, 3 H. L. Cas. 161; *Bright v. Hutton*, 3 H. L. Cas. 368. An application for shares and payment of the first deposit does not constitute one a partner, where he had not interfered in the concern. *Hedge's Appeal*, 63 Pa. 273. Persons who subscribe for shares in joint-stock companies and pay deposits, but do not comply with the full conditions of the association, and never become entitled to profits, are not liable for debts, unless they are active in contracting them, or hold themselves out as partners. The same principle will apply, as far as it can, to a suggested limited partnership not carried through. *West Point Foundry Ass'n v. Brown*, 3 Edw. Ch. (N. Y.) 284.

¹⁵⁹ See *infra*, § 12.

¹⁶⁰ See *supra*, § 24.

STOCKHOLDERS IN ILLEGAL OR DEFECTIVE CORPORATIONS.

29. Where the corporation is wholly illegal and unauthorized by law, the stockholders are liable as partners.
30. Members of a corporation de facto, acting in good faith under the belief that they constitute a corporation, are not liable as partners.
31. Mere defects in organization, such as failure to comply with some statutory requirement, will not, by the weight of authority, render the members liable as partners.

Illegal or Unauthorized Corporations.

Where persons assume to act as a corporation wholly without authority of law they have usually been held to be liable as partners.¹⁶¹ In such a case they must be presumed to know that they are not stockholders in a valid corporation, and, as it is clear that they intended to own and share the profits in common, they are partners, because they have intended and done those things which in law constitute a partnership.¹⁶² Even good faith and the advice of counsel will not overcome the presumption of knowledge of law, and protect them from partnership liability.¹⁶³ Thus, in the absence of any statute under which a corporation could be created, the members of an attempted corporation are liable as partners.¹⁶⁴ So, members of a corporation organized for one purpose under a statute which authorizes corporations only for other

¹⁶¹ Where the corporation is simply a disguise for gambling transactions, the members are personally liable. *McGrew v. City Produce Exch.*, 85 Tenn. 572, 4 Am. St. Rep. 771.

¹⁶² See *supra*, § 13, "Intention the Real Test."

¹⁶³ *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, *Mechem's Cases*, 8.

¹⁶⁴ *In re Mendenhall*, 9 N. B. R. 497, Fed. Cas. No. 2,425.

purposes, are liable as partners.¹⁶⁵ Incorporators under an unconstitutional law are liable as partners.¹⁶⁶

De Facto Corporations.

The members or stockholders of a *de facto* corporation, as distinguished from one which is entirely illegal or unauthorized, are not liable as partners.¹⁶⁷ The status of a *de facto* corporation can not be attacked save in a direct proceeding for that purpose by the state.

Defects in Organization.

Where persons act in good faith, honestly believing that they constitute a corporation, but, owing to a failure to comply with some statutory requirement, no valid incorporation has been effected, the weight of authority is that they can not be held liable as partners,¹⁶⁸ but the authorities taking a con-

¹⁶⁵ *Vredenburg v. Behan*, 33 La. Ann. 627. In this case there was an attempt to incorporate a rifle club under a statute which authorized corporations only for literary, scientific, or charitable purposes. See, also, *Booth v. Wonderly*, 36 N. J. Law, 250; *Merchants' & Manufacturers' Bank v. Stone*, 38 Mich. 779, and note the dissenting opinion.

¹⁶⁶ *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, *Mechem's Cases*, 8. But see *State v. How*, 1 Mich. 512.

¹⁶⁷ *Stout v. Zulick*, 48 N. J. Law, 599, 7 Atl. 362; *Snider's Sons Co. v. Troy*, 91 Ala. 244, 8 So. 658; *Merriman v. Magiveny*, 12 Heisk. (Tenn.) 494; *Cannon v. Brush Elec. Co.*, 96 Md. 446, 54 Atl. 121; *American Salt Co. v. Heldenheimer*, 80 Tex. 344; *Planters' & Miners' Bank v. Padgett*, 69 Ga. 159; *Merchants' & Manufacturers' Bank v. Stone*, 38 Mich. 779; *In re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383.

¹⁶⁸ *Humphreys v. Mooney*, 5 Colo. 282; *Stafford Nat. Bank v. Palmer*, 47 Conn. 443; *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54; *Tarbell v. Page*, 24 Ill. 46; *Doty v. Patterson*, 155 Ind. 60, 56 N. E. 668; *Ward v. Brigham*, 127 Mass. 24; *First Nat. Bank v. Almy*, 117 Mass. 476; *Fay v. Noble*, 7 Cush. (Mass.) 188; *Seacord v. Pendleton*, 55 Hun, 579, 9 N. Y. Supp. 46; *Ralsbeck v. Oesterlicher*, 4 Abb. N. C. (N. Y.) 444; *Central City Sav. Bank v. Walker*, 66 N. Y. 424; *Fuller v. Rowe*, 57 N. Y. 23; *Second Nat. Bank v. Hall*, 35 Ohio St 158;

trary view are very numerous.¹⁶⁹ Of course, many cases of defectively organized corporations fall under the rule of *de facto* corporations. It has been held that a person who contracts with an association without any knowledge or notice of their claim of corporate existence may sue the associates as partners, and show that they have failed to comply with the law under which they claim to be organized.¹⁷⁰ Where the members of an existing partnership attempt to form a corporation to carry on the corporate business, and, through noncompliance with the law, no valid corporation is formed, the members remain partners.¹⁷¹ The individuals who transact the business on behalf of the supposed corporation are personally liable in the same way as an ostensible agent is personally liable where he has no real principal.¹⁷²

Rutherford v. Hill, 22 Or. 218; Cochran v. Arnold, 58 Pa. 399; Stokes v. Findlay, 4 McCrary, 205, Fed. Cas. No. 13,478; Gartside Coal Co. v. Maxwell, 22 Fed. 197. But see Bigelow v. Gregory, 73 Ill. 197. Directors of a bank completely organized and incorporated under the national banking act, except that it has no certificate from the comptroller authorizing it to act, are not liable as copartners on a lease entered into for business headquarters, as in such case they are not acting as agents of an assumed corporation, but of a corporation *de jure*, as yet powerless to make a lease. Seeberger v. McCormick, 178 Ill. 404, 53 N. E. 340.

¹⁶⁹ Garnett v. Richardson, 35 Ark. 144; Bigelow v. Gregory, 73 Ill. 197; Flagg v. Stowe, 85 Ill. 164; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85, 8 N. W. 772, Mechem's Cases, 16; Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 343; Glenn v. Bergman, 20 Mo. App. 343; Ferris v. Thaw, 72 Mo. 446; Martin v. Fewell, 79 Mo. 401; Abbott v. Omaha S. & R. Co., 4 Neb. 416; Unity Ins. Co. v. Cram, 43 N. H. 636; Hill v. Beach, 12 N. J. Eq. 31; National Union Bank v. Landon, 45 N. Y. 410; Jessup v. Carnegie, 80 N. Y. 441; Elliot v. Himrod, 108 Pa. 569; Smith v. Colorado Fire Ins. Co., 14 Fed. 399.

Persons carrying on business under a firm name after an abortive attempt to form a corporation are liable as copartners. Simmons v. Ingram, 78 Mo. App. 603.

¹⁷⁰ Guckert v. Hacke, 159 Pa. 303, 28 Atl. 249.

¹⁷¹ Bates, Partn. § 8.

¹⁷² Medill v. Collier, 16 Ohio St. 599; Second Nat. Bank v. Hall,

Knowledge of Lack of Corporate Existence.

Persons transacting business as a corporation, but who know that for one reason or another they do not constitute a valid corporation, are liable as partners.¹⁷³ So, where they knowingly conduct a business not authorized by their charter,¹⁷⁴ or continue business knowing that their charter has expired,¹⁷⁵ they will be held liable as partners. The reason for this is that, where they know that they are not a corporation, it is clear that they intended to carry on a business and share the profits in common, and, as has been seen, this constitutes a partnership.

PARTNERSHIP AS TO THIRD PERSONS.

32. Persons not really partners inter se may incur liability to third persons as though they were partners.
33. This liability has been declared in two classes of cases—
 - (a) Where the parties have shared profits, and
 - (b) Where the parties have held themselves out as partners.

SAME—BY SHARING PROFITS.

34. By the great weight of modern authority, persons who share the profits of a business are not, for that reason alone, liable as partners to third persons, unless they are really partners inter se.

The former doctrine, that any sharing of the profits of a business was sufficient to fix a partnership liability upon the

35 Ohio St. 158, 166; *Fuller v. Rowe*, 57 N. Y. 23. The liability is in tort for acting as agents without a principal, and not in contract. *Trowbridge v. Scudder*, 11 Cush. (Mass.) 83.

¹⁷³ *Ridenour v. Mayo*, 40 Ohio St. 9; *Stafford Nat. Bank v. Palmer*, 47 Conn. 443. See, also, *Gartside Coal Co. v. Maxwell*, 22 Fed. 197.

¹⁷⁴ *Rianhard v. Hovey*, 13 Ohio, 300; *Ridenour v. Mayo*, 40 Ohio St. 9. Contra, *Trowbridge v. Scudder*, 11 Cush. (Mass.) 83.

¹⁷⁵ *National Union Bank v. Landon*, 45 N. Y. 410.

persons so sharing profits, irrespective of their actual relation *inter se*, has already been sufficiently discussed.¹⁷⁶ It has also been seen that, since the decision of *Cox v. Hickman*, this erroneous doctrine has been almost completely abandoned, and now persons are not liable as partners, although they share profits, unless they really are partners.¹⁷⁷ There is no longer any distinction between partnerships *inter se* and partnerships as to third persons.¹⁷⁸

SAME—BY HOLDING OUT.

35. Whoever knowingly suffers himself to be represented as a partner in a particular firm is liable as a partner, upon the principle of estoppel, to any one who has, on the faith of such representation, given credit to the firm.
36. No one is liable as a partner upon the ground of holding out unless two things concur, viz.:
 - (a) The holding out must have been done by him or by his consent, and,
 - (b) The holding out must have been known to the person seeking to avail himself of it.
37. Holding out imposes no liability for torts.

Although it is an erroneous use of the term to speak of a partnership as to third persons where there is no partnership *inter se*, a person may be estopped to deny the fact that

¹⁷⁶ See *supra*, § 9, "Former Doctrine."

¹⁷⁷ See *supra*, § 10, "Modern Doctrine." Without a contract of partnership, or such acts and declarations as lead others to infer its existence, and to extend credit on that basis, there is no foundation on which liability as a partner can rest. In *re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383. But see other Pennsylvania cases cited *supra*, § 10.

¹⁷⁸ "'Partnership' is a relation *inter se*, and the word cannot, in strictness, be used except to signify that relation." *Beecher v. Bush*,

he is a partner. "Where a man holds himself out as a partner, or allows others to do it, he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel."¹⁷⁹ It is wholly immaterial whether the party holding himself out as a partner does or does not share the profits or losses.¹⁸⁰ Even if the creditor knows that the real partners

45 Mich. 188, 7 N. W. 785, *Mechem's Cases*, 86. See, also, to same effect, the remarks of Bramwell, B., in *Bullen v. Sharp*, L. R. 1 C. P. 86.

¹⁷⁹ *Mollwo v. Court of Wards*, L. R. 4 P. C. 435. See, also, *Waugh v. Carver*, 2 H. Bl. 235, *Burdick's Cases*, 47, *Mechem's Cases*, 67, wherein the court said: "Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labor nor money, and, to go still further, not to receive any profits. But if he will lend his name as a partner he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which the creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when, in fact, they lent it only to two of them, to whom, without the others, they would have lent nothing." "A nominal partner, who does not share in the profits, is not really a partner. His liability to creditors is imposed upon him by law upon the ground of a general policy to preserve good faith and prevent frauds in business transactions." *Oppenheimer v. Clemmons*, 18 Fed. 888. See, also, *Poole v. Fisher*, 62 Ill. 181; *Kirk v. Hartman*, 63 Pa. 97; *Cook v. Penrhyn Slate Co.*, 36 Ohio St. 135; *Lancaster Co. Nat. Bank v. Boffenmyer*, 162 Pa. 559, 59 Atl. 855; *Thomas v. Green*, 30 Md. 1; *De Berkow v. Smith*, 1 Esp. 29, *Ames' Cas. Partn.* 138. "A partnership, as regulating the relations and interests of the members among themselves, is not the same as a partnership formed and acting as such in its relations to others. The latter may exist when held out to the world, and inviting persons to deal with it, when the association among the members may not be a partnership." *Day v. Stevens*, 88 N. C. 88.

¹⁸⁰ *Pringle v. Leverich*, 16 Jones & S. (N. Y.) 90; *Fisher v. Bowles*, 20 Ill. 396; *Ex parte Watson*, 19 Ves. 461; *Kirkwood v. Cheetham*, 2 Fost. & F. 798.

have stipulated to indemnify the party lending his name against liability, he is primarily liable to the creditor, and must seek his indemnity from those who promised it.¹⁸¹

The question of the effect of holding oneself out as a partner cannot be raised between the partners themselves, because everyone is presumed to know who are his associates in business.¹⁸²

Requisite Character of the Holding Out.

As the liability in this class of cases rests upon estoppel, it is obvious that a person cannot justly be held liable unless the holding out was his own personal act,¹⁸³ or unless it was done with his knowledge and consent;¹⁸⁴ but the authority or consent to a holding out by others may be either express or implied, and, in either case, liability is incurred.¹⁸⁵ And if

¹⁸¹ Lindl. Partn. p. 41, citing *Brown v. Leonard*, 2 Chit. 120. See, also, *supra*, § 19, "Sharing Profits with Stipulation against Losses." *Alderson v. Popes*, 1 Camp. 404, note, seems to hold to the contrary, but the report is unsatisfactory, and the case has been criticised by Lindley (page 41).

¹⁸² *Freeman v. Bloomfield*, 43 Mo. 391.

¹⁸³ *Cassidy v. Hall*, 97 N. Y. 159; *Denithorne v. Hook*, 112 Pa. 240, 3 Atl. 777; *Bishop v. Georgeson*, 60 Ill. 484; *Seabury v. Bolles*, 51 N. J. Law, 103, 16 Atl. 54; *Benjamin v. Covert*, 47 Wis. 375, 2 N. W. 625; *De Berkom v. Smith*, 1 Esp. 29, Ames' Cas. Partn. 138.

¹⁸⁴ *Nicholson v. Moog*, 65 Ala. 471; *Bartlett v. Powell*, 90 Ill. 331; *Wheeler v. McEldowney*, 60 Ill. 358; *Fletcher v. Pullen*, 70 Md. 205, 16 Atl. 887, *Mechem's Cases*, 134; *Kritzer v. Sweet*, 57 Mich. 617, 24 N. W. 764; *Rittenhouse v. Leigh*, 57 Miss. 697; *Appeal of Scull*, 115 Pa. 141, 7 Atl. 588; *Ihmsen v. Lathrop*, 104 Pa. 365. See, also, cases cited in preceding note. A person cannot be made a partner in fact, or appearance, so as to bind him, unless by his consent, admissions, or acts. The declarations or acts of others can have no such effect unless authorized or ratified by him. *Bishop v. Georgeson*, 60 Ill. 484.

¹⁸⁵ *Holland v. Long*, 57 Ga. 36; *Hinman v. Littell*, 23 Mich. 484; *In re Jewett*, 15 N. B. R. 126, Fed. Cas. No. 7,306; *Thompson v. First Nat. Bank*, 111 U. S. 529. Consent may be inferred from a knowledge of the holding out, and a failure to take any steps in repudia-

there has been in fact a holding out, it is immaterial, so far as liability to third persons is concerned, that consent to such holding out was obtained by fraud or promises of irresponsibility, provided the creditor had nothing to do with such fraud or promises.¹⁸⁶ Perhaps the most common case of liability by holding out is where a retiring partner fails to give notice of his retirement from the firm. In such a case, he is usually held liable to those who deal with the firm believing him still to be a member.¹⁸⁷ Where the business is continued in the old name, with the consent or acquiescence of the retiring partner, he may be liable upon the ground of holding out, even though a notice of dissolution was published.¹⁸⁸ But the death of a partner *ipso facto* dissolves a partnership, and notice thereof is not necessary to relieve the estate of the de-

tion of the act. *Wright v. Boynton*, 37 N. H. 9; *Smith v. Hill*, 45 Vt. 90. But compare *Polk v. Oliver*, 56 Miss. 566. Knowledge or consent "may be inferred from circumstances, such as advertisements, shop bills, signs, or cards, and from various other acts, from which it is reasonable to infer that the holding out was with his authority, knowledge, or assent." *Fletcher v. Pullen*, 70 Md. 205, 16 Atl. 887, *Mechem's Cases*, 134.

¹⁸⁶ *Lindl. Partn.* p. 42; *Collingwood v. Berkeley*, 15 C. B. (N. S.) 145; *Maddick v. Marshall*, 16 C. B. (N. S.) 387; *Ellis v. Schmaeck*, 5 Bing. 521.

¹⁸⁷ The liability of retiring partners will be fully considered in a subsequent chapter. See, *infra*, §§ 118-122. But see, in this connection, *Scarf v. Jardine*, L. R. 7 App. Cas. 345, *Burdick's Cases*, 101; *Newsome v. Coles*, 2 Camp. 617; *Benjamin v. Covert*, 47 Wis. 375, 12 N. W. 625. Where a partnership incorporates, and the company continues to use the firm books, and continues the various running accounts without break, it is estopped to set up the incorporation as a defense against one who, without notice of the change, sells its goods, and charges them to the firm. *Reid v. F. W. Kreling's Sons' Co.*, 125 Cal. 117, 57 Pac. 773.

¹⁸⁸ *Fleming v. Dorn*, 34 Ga. 213; *Wait v. Brewster*, 31 Vt. 516. But compare *Boyd v. McCann*, 10 Md. 118, wherein it was held that the fact that the firm name was kept over the door of the place of business after dissolution of the partnership is not, of itself, sufficient to charge the retiring partner.

ceased partner from liability on contracts made by the surviving partners, even though they continue the business in the old name. The doctrine of holding out has never been applied to such a case.¹⁸⁹ A representation that one intends to become a partner, as distinguished from a representation that one is in fact a partner, does not impose any liability.¹⁹⁰ And one need not deny an unauthorized announcement that he is a partner^{190a} unless the circumstances of its making are such that good faith requires him to speak. A person may hold himself out as a partner, or permit others to do so, and yet conceal his name. Thus, if he is referred to as a partner who does not wish his name disclosed, he is liable as a partner.¹⁹¹ Whether or not a person has held or permitted himself to be held out as a partner is a question of fact, and not of law.¹⁹²

Creditor's Knowledge of Holding Out.

It has been thought that a person holding himself out as a partner is liable as such to all the world, irrespective of whether or not the creditor actually knew of such holding

¹⁸⁹ Lindl. Partn. p. 47; Webster v. Webster, 3 Swanst. 490; Dickinson v. Dickinson, 25 Grat. (Va.) 321, Mechem's Cases, 374; Marlett v. Jackman, 3 Allen (Mass.) 287, Burdick's Cases, 547; Caldwell v. Stilleman, 1 Rawle (Pa.) 212.

¹⁹⁰ Bourne v. Freeth, 9 Barn & C. 632. Where it is shown that a partnership existed between three persons, and, on the retirement of one, the other two issued a statement announcing that they would continue the business, and they did so through the same agencies, and with unchanged assets and liabilities, such statement and course of dealing are sufficient to establish the existence of a partnership between them as to the property and business of the old firm. Earle v. Art Library Pub. Co., 95 Fed. 544.

^{190a} Munton v. Rutherford, 121 Mich. 418, 80 N. W. 112.

¹⁹¹ Martyn v. Gray, 14 C. B. (N. S.) 824; Maddick v. Marshall, 16 C. B. (N. S.) 387.

¹⁹² Seabury v. Bolles, 51 N. J. Law, 103, 16 Atl. 54. Whether a person held himself out as a partner is a fact to be ascertained by

out.¹⁹³ But this view ignores the fact that liability by holding out rests upon the principle of estoppel, and that estoppel in turn rests upon the fact that one has, by his conduct, induced another to so alter his position, in reliance upon certain

the jury from all the evidence in the case. *Thomas v. Green*, 30 Md. 1. It is a question of fact, and not of law. *Fletcher v. Pullen*, 70 Md. 205, 16 Atl. 887, *Mechem's Cases*, 134. Different juries may come to different conclusions upon the same evidence. This is well illustrated by the two cases of *Wood v. Duke of Argyll*, 6 Man. & G. 928, and *Lake v. Duke of Argyll*, 6 Q. B. 477. In both the cases, the same acts were relied on to constitute a holding out, but in one the jury found that there had been a holding out, and in the other that there had not, and in both cases the court refused to set aside the verdict.

A. and B. were partners. They agreed with C., who was the salesman, to associate his name with the firm. C. was to receive for his services at the rate of four per cent., on the amount of cash and credit sales, but was not to be bound for the debts of the firm. A notice was published, in a newspaper of large circulation, that C. was to have an interest in the establishment. It was held that this was not a declaration of partnership, and did not make C. responsible for the debts of the firm. *Vinson v. Beveridge*, 3 MacArthur (D. C.) 597. Where a mercantile agency, in behalf of a subscriber, obtained statements from the person inquired about that he was a partner in a certain firm, and such statements were sent to the subscriber, who relied thereon, and extended credit to the firm, a jury is warranted in finding him liable as a partner. *Ellison v. Stuart*, 2 Pen. (Del.) 179, 43 Atl. 836.

¹⁹³ *Young v. Axtell*, cited in *Waugh v. Carver*, 2 H. Bl. 242, *Burdick's Cases*, 47, *Mechem's Cases*, 67; *Mershon v. Hobensack*, 22 N. J. Law, 372; *Pringle v. Leverich*, 16 Jones & S. (N. Y.) 90; *Poillon v. Secor*, 61 N. Y. 456, *Ames' Cas. Partn.* 147. In *Poillon v. Secor*, 61 N. Y. 456, *Ames' Cas. Partn.* 147, a person of the same name as the retiring partner loaned his name to the firm for a consideration, and the business was continued in the old firm name. This was held to render such person liable as a partner to a creditor who did not know of his connection with the firm, and who had not relied upon him. The court said that the estoppel in this class of cases might be rested upon the broad ground of public policy. The court expressly approved the following rule stated by Mr. Parsons: "Where one is held forth to the world as a partner, the first question is, was he so held out by his own authority, assent, or connivance, or by

facts, that it would be inequitable to allow the former to deny such facts. Where the creditor did not know of the holding out, it is, of course, clear that he did not extend credit or alter his position in reliance upon the fact of partnership, and there is therefore no reason why the alleged partner should be estopped to deny that fact. Accordingly, the better opinion is that a person held out as a partner is not liable as such except to those who knew of such holding out previously to giving credit, and were misled thereby.¹⁹⁴ Of course the holding

his negligence? If by his authority, consent, or connivance, the presumption is absolute that he was so held out to every customer or creditor. If so held out by his own negligence only, he should be held only to a creditor who has been actually misled thereby." See, also, *Pringle v. Leverich*, 16 Jones & S. (N. Y.) 90.

¹⁹⁴ *Vinson v. Beveridge*, 8 MacArthur (D. C.) 597; *Hefner v. Palmer*, 67 Ill. 161; *Sheldon v. Bigelow*, 118 Iowa, 586; *Allen v. Dunn*, 15 Me. 292, 33 Am. Dec. 614; *Wood v. Pennell*, 51 Me. 52; *Fletcher v. Pullen*, 70 Md. 205, 16 Atl. 887, *Mechem's Cases*, 134; *Rice v. Barrett*, 116 Mass. 312; *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785; 40 Am. Rep. 465, *Mechem's Cases*, 86; *Kritser v. Sweet*, 57 Mich. 617, 24 N. W. 764; *Rimel v. Hayes*, 83 Mo. 200; *Webster v. Clark*, 34 Fla. 637, 16 So. 601; *Parchen v. Anderson*, 5 Mont. 438, 51 Am. Rep. 65; *Seabury v. Bolles*, 51 N. J. Law, 103, 16 Atl. 54; *Cook v. Penrhyn Slate Co.*, 36 Ohio St. 185; *Denithorne v. Hook*, 112 Pa. 240, 3 Atl. 777; *Pringle v. Leverich*, 16 Jones & S. (N. Y.) 90; *Cassidy v. Hall*, 97 N. Y. 159; *Irvin v. Conklin*, 36 Barb. (N. Y.) 64; *Shafer v. Randolph*, 99 Pa. 250; *Kirk v. Hartman*, 63 Pa. 97; *Thompson v. First Nat. Bank*, 111 U. S. 529, *Burdick's Cases*, 96; *Pott v. Eytan*, 3 C. B. 32. But see *Smith v. Hill*, 45 Vt. 90, 13 Am. Rep. 189.

"The liability in such a case rests upon the principle of estoppel, that by holding himself out, or permitting himself to be held out, as a partner, he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the person so held out as a member of the firm. As the liability in such a case rests solely upon the ground that one cannot be permitted to deny a partnership relation which, though not existing in fact, he has asserted or permitted to appear to exist, there is no just foundation for holding one liable as a partner when in fact he was not one, although held out as such, when the creditor did not know of the holding out, and did not act upon the supposi-

out may be under such circumstances of publicity as to justify a jury in finding that the creditor knew of it, and acted upon it.¹⁹⁵ Unless the holding out occurred prior to the making of the contract in suit, there is no liability, because it was obvi-

tion that the person sought to be charged was a partner in a firm when dealings were had with and credit given to said firm. The rule is correctly stated, we think, in the case of *Thompson v. First Nat. Bank*, 111 U. S. 529, *Burdick's Cases*, 96, where it was held that a person who is not actually a partner, and who has no interest in the partnership, cannot, by reason of having held himself out to the world as a partner, be held liable as such on a contract made by the partnership with one who had no knowledge of the holding out. *Wood v. Pennell*, 51 Me. 52; *Cook v. Penryhn Slate Co.*, 36 Ohio St. 135; *Hicks & Co. v. Cram*, 17 Vt. 449; *Seabury v. Bolles*, 51 N. J. Law, 103, 16 Atl. 54. In this connection it may be stated, as was observed in the case of *Thompson v. First Nat. Bank*, that there may be cases in which the holding out has been public, and so long continued that a jury may infer that one dealing with the partnership knew it, and relied upon it, without direct testimony to that effect." *Webster v. Clark*, 34 Fla. 644, 16 So. 601.

"In *Burgan v. Cahoon*, 1 Pennypacker (Pa.) 320, it was said by the court below, and affirmed by this court, that 'the evidence from which you would have to find that he has so held himself out and acted as a partner must be his acts in connection with the circumstances that were known to the plaintiffs when they gave him credit, and not only must his acts have been such as to justify a reasonable belief that he was a partner, but to hold him on that account you must further find, as a matter of fact, that they gave him credit as such, because, if they did not, his holding himself out as a partner would do them no harm.' This proposition of law is accurately stated and sustained by abundant authority. The rule is thus given in 1 Colly. Partn. § 19: 'No person can be fixed with liability on the ground that he has been held out as a partner, unless two things occur, viz.: First, the alleged act of holding out must have been done either by him, or by his consent; and, secondly, it must have been known to the person seeking to avail himself of it.'"

¹⁹⁵ *Webster v. Clark*, 34 Fla. 644, 16 So. 601; *Thompson v. First Nat. Bank*, 111 U. S. 530, *Burdick's Cases*, 96. In *Dickinson v. Valpy*, 10 Barn. & Co. 140, Lord Wensleydale said: "If it could have been proved that the defendant held himself out to be a partner, not to the world, for that is a loose expression, but to the plaintiff him-

ously not relied upon.¹⁹⁶ So, where the creditor knew of the holding out, but also knew that the parties were not partners, no liability as such exists.¹⁹⁷

self, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant upon the faith of his being a partner." See, also, opinion of Blackburn in *Scarf v. Jardine*, 7 L. R. App. Cas. 357, *Burdick's Cases*, 101. Mere proof of publication in a newspaper is not sufficient to show that the creditor had such knowledge at the time of the transaction. *Vinson v. Beveridge*, 3 MacArthur (D. C.) 597.

A witness for plaintiff testified that there was a sign upon the factory of the company which read, "Hall, Nicoll & Granberry's Factory, Top Floor." There was no proof that plaintiffs ever saw or knew of the sign, or that any reliance was placed upon it when their debt was contracted. It was held that this testimony was insufficient to authorize a recovery against said defendants. So, also, held as to declarations of one of the defendants to customers, referring to the factory as their own, and speaking of its work as work they were doing, in the absence of evidence that it was known to or relied upon by plaintiffs when they sold the goods. *Cassidy v. Hall*, 97 N. Y. 160.

¹⁹⁶ *Howes v. Fisk*, 67 N. H. 289, 30 Atl. 351; *Baird v. Planque*, 1 Fost. & F. 344.

¹⁹⁷ *Alderson v. Popes*, 1 Camp. 404, note, *Ames' Cas. Partn.* 140; *Krans v. Luthy*, 56 Ill. App. 506; *Booe v. Caldwell*, 12 Ind. 12; *Pratt v. Langdon*, 97 Mass. 97. But see *Brown v. Leonard*, 2 Chit. 120, *Ames' Cas. Partn.* 141, wherein the plaintiff had notice that one partner had retired from the firm, but that his name was to continue in the firm until a future day. Having this notice, the plaintiff became the holder of the note in suit, executed in the firm name. It was held that the retired partner was liable upon the note, notwithstanding the notice of plaintiff, upon the ground that plaintiff had relied upon the legal responsibility incurred by a holding out.

When a third party has notice of the actual agreement existing between those who hold themselves out as partners without being such, he is bound to recognize its provisions, and if by them there is no partnership *inter sese*, they are no longer (after such notice) to be considered as partners so far as he is concerned. *Beudel v. Hettrick*, 3 Jones & S. (N. Y.) 405. One who deals with persons

Liability for Torts.

The doctrine under consideration has no proper application to actions of tort arising from the negligent conduct of the alleged firm, where no trust has been put in it.¹⁹⁸ But disregarding the principle of estoppel, which is the foundation of the rule, it has been held that the nominal partner is liable even in cases of torts.¹⁹⁹ Of course, if the nominal partner participates in any way in the tort, he may properly be held liable. So, where the tort is founded upon a contract, which contract was made under such circumstances of holding out as to bind the nominal partner, he is liable in an action sounding in tort.²⁰⁰

who declare themselves partners, and so conduct themselves, may hold them liable as partners, even though he has notice of the actual agreement between them. He is not bound, at his peril, to put a correct construction upon their agreement, different from that which they have themselves put upon it. *Stearns v. Haven*, 14 Vt. 540.

¹⁹⁸ Lindl. Partn. p. 47.

¹⁹⁹ In *Stables v. Eley*, 1 Car. & P. 614, Ames' Cas. Partn. 142, a retired partner, whose name had been permitted to remain on a cart used in the business, was held liable to one injured by the negligence of the driver. This case has been criticised in Lindl. Partn. p. 47, and in *Bates*, Partn. § 102. See, upon the general principle involved, the following cases, none of which, however, were partnership cases: *Robb v. Shephard*, 50 Mich. 189, 15 N. W. 76; *Jackson v. Pixley*, 9 Cush. (Mass.) 490; *Hall v. White*, 3 Car. & P. 136; *Phillipsburgh Bank v. Fulmer*, 31 N. J. Law, 550.

²⁰⁰ *Sherrod v. Langdon*, 21 Iowa, 518, *Burdick's Cases*, 112. Where the tort consists substantially of a breach of a contract of bailment, which contract was made under such circumstances as to bind the nominal partner, he may be held liable in an action of tort. *Maxwell v. Gibbs*, 32 Iowa, 32.

CHAPTER II.

CLASSIFICATIONS AND DEFINITIONS.

- 38-40. Partnerships Classified.
- 41. Universal Partnerships.
- 42. General Partnerships.
- 43. Special or Particular Partnerships.
- 44. Trading and Nontrading Partnerships.
- 45. Partners Classified.

PARTNERSHIPS CLASSIFIED.

- 38. Partnerships classified with reference to the nature of the association are either—
 - (a) Ordinary partnerships,
 - (b) Limited partnerships, or
 - (c) Joint-stock companies.
- 39. Partnerships classified with reference to their extent are either—
 - (a) Universal partnerships,
 - (b) General partnerships, or
 - (c) Special or particular partnerships.
- 40. Partnerships classified with reference to their business are either—
 - (a) Trading partnerships, or
 - (b) Nontrading partnerships.

Limited Partnerships and Joint-Stock Companies.

The definition, nature, and incidents of limited partnerships and joint-stock companies may be most conveniently ex-

plained after a consideration of ordinary partnerships. This subject is accordingly reserved for a later chapter.¹

SAME—UNIVERSAL PARTNERSHIPS.

41. A universal partnership is one in which the parties bring into the firm all their property, of whatever nature, and employ all their services for the common benefit.

It has been said that there is probably no such thing in fact as a universal partnership, in the sense that everything done, bought, or sold is to be deemed so done on partnership account.² Nevertheless it is generally conceded that such a partnership is theoretically possible, and several cases have occurred which were practically universal partnerships.³

SAME—GENERAL PARTNERSHIPS.

42. A general partnership is one formed to transact some general class of business.

A general partnership is one whose business includes all transactions of a particular class, as where several persons agree to carry on as partners the business of bankers, grocers, etc. A general partnership may, of course, be formed to

¹ See chapter 13, "Limited Partnerships," and chapter 12, "Joint-Stock companies."

² Per Story, J., in *U. S. Bank v. Binney*, 5 Mason, 176, 183, Fed. Cas. No. 16,791.

³ See *Rice v. Barnard*, 20 Vt. 479; *Gray v. Palmer*, 9 Cal. 616; *Lyman v. Lyman*, 2 Paine, 11, Fed. Cas. No. 8,628; *Gasely v. Separatists' Soc.*, 13 Ohio St. 144; *Goesele v. Bimeler*, 14 How. (U. S.) 589; *Murrell v. Murrell*, 33 La. Ann. 1233; *Fuller v. Ferguson*, 26 Cal. 546.

carry on several kinds or classes of business. Some of the definitions to be found in the books define general partnerships in terms broad enough to include universal partnerships.⁴ But the above definition gives the correct meaning of the term.

SAME—SPECIAL OR PARTICULAR PARTNERSHIPS.

43. A special or particular partnership is one formed for a single transaction

In some of the books, the term "limited partnerships" has been applied to partnerships for a single transaction. This sense of the term must not be confounded with the modern statutory limited partnership, which of course, is not confined to a single transaction.⁵

⁴ See Story, Partn. § 75, and see comments in Bates, Lim. Partn. § 1. "They may be divided into general and special or limited partnerships. General partnerships are properly such where the parties carry on all their trade and business for their joint benefit and profit, and it is not material whether the capital stock be limited or not, or the contributions of the parties be equal or unequal." *Bigelow v. Elliot*, 1 Cliff. 32, Fed. Cas. No. 1,399, citing *Willet v. Chambers*, Cowp. 814.

⁵ See post, c. 13, "Limited Partnerships." "Special partnerships are those formed for a special or particular branch of business, as contradistinguished from the general business or employment of the parties, or one of them. When they extend to a single transaction or adventure only, such as the purchase and sale of a particular parcel of goods, they are more commonly called "limited partnerships," but the appellation is indiscriminately applicable to both classes of cases." *Bigelow v. Elliot*, 1 Cliff. 32, Fed. Cas. No. 1,399. To constitute a general partnership, it is enough that the parties agree to conduct a business, and to share its profit and loss. Whether the business is of a general nature, or is confined to particular transactions, the partnership is general. *Eldridge v. Troost*, 3 Abb. Prac. (N. S.; N. Y.) 20.

SAME—TRADING AND NONTRADING PARTNERSHIPS.

44. A trading or commercial partnership is one whose business consists in buying or preparing for sale and selling commodities for profit.⁶

If it does not buy or sell, it is a partnership of employment or occupation, and not a trading or commercial partnership.⁷ Thus, a partnership to transact the business of running a store,⁸ or dealing in cattle,⁹ or buying and killing cattle, and selling the meat,¹⁰ or merchant tailoring,¹¹ is a trading partnership, while a partnership between attorneys for the practice of the law,¹² or between mere factors and brokers,¹³ or a firm of printers and publishers,¹⁴ is a nontrading partnership.

The only purpose of the distinction between trading and nontrading partnerships is to determine how far a partner has implied power to bind his firm upon commercial paper, each partner's implied power being limited to acts within the general scope or course of the partnership business. This subject will be referred to again in a succeeding chapter.¹⁵

⁶ *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529; *Detts v. Regnier*, 27 Kan. 94; *Lee v. First Nat. Bank*, 45 Kan. 8; *Hoskinson v. Elliot*, 62 Pa. 393; *Smith v. Collins*, 115 Mass. 388.

⁷ *Lee v. First Nat. Bank*, 45 Kan. 8, 25 Pac. 196.

⁸ *Walsh v. Lennon*, 38 Ill. 27; *Palmer v. Scott*, 68 Ala. 380.

⁹ *Smith v. Collins*, 115 Mass. 388.

¹⁰ *Wagner v. Simmons*, 61 Ala. 143.

¹¹ *Ah Lep v. Gong Choy*, 13 Or. 205.

¹² *Friend v. Duryee*, 17 Fla. 111; *Smith v. Slean*, 37 Wis. 235; *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 629; *Hedley v. Bainbridge*, 2 Adol. & E. (N. S.) 316.

¹³ *Deardorf's Adm'r v. Thacher*, 78 Mo. 128; *Third Nat. Bank v. Snyder*, 10 Mo. App. 211.

¹⁴ *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 629.

¹⁵ See post, c. 9, "Rights and Liabilities as to Third Persons."

PARTNERS CLASSIFIED.

45. The relation of a partner to his firm or to third persons is often indicated by designating him as—
- (a) Ostensible.
 - (b) Secret.
 - (c) Active.
 - (d) Silent.
 - (e) Dormant.
 - (f) Nominal.
 - (g) Incoming.
 - (h) Retiring.
 - (i) Liquidating.
 - (j) General.
 - (k) Special.

Ostensible Partners.

An ostensible partner is one who is held out and known as a partner,—one who exhibits himself to the public as connected with a partnership, and interested in its business.

Secret Partner.

A secret partner is one whose relation to the firm is concealed.

Active Partners.

An active partner is one who takes an active part in the conduct of the firm business. He may be either a secret or an ostensible partner.

Silent Partners.

A silent partner is one who takes no active part in the management of the firm business, and exercises none of the rights of a partner beyond receiving his share of the profits. He

may be either a secret or an ostensible partner, though the term is sometimes thought to apply only to secret partners.

Dormant Partners.

A dormant partner is one who is both a secret and silent partner.¹⁶ The term is often used, however, as meaning

¹⁶ Pars. Partn. § 31. A dormant partner takes no part in the control or management of the partnership business. *Cochran v. Anderson Co. Nat. Bank*, 83 Ky. 44, 47. A dormant partner is interested in the business of the firm, and participates in the profits, but is not publicly known in this relation. *Oppenheimer v. Clemmons*, 18 Fed. 890; *Speake v. Prewitt*, 6 Tex. 258. A dormant partner is one whose name is not mentioned in the title of the firm, or embraced in some general term, as "Company," "Sons," etc. *Jones v. Fegely*, 4 Phila. (Pa.) 1.

Where the firm name contains the suffix "& Co.," and no provision is made in the partnership articles that a member whose name does not appear shall be kept secret, and in fact it is not kept secret, such member is not a dormant partner, and, upon retiring, he must give express notice to firm customers, even if they did not in fact know of his membership, the suffix "& Co." indicating an undisclosed principal. *Elmira Iron & Steel Rolling Mill Co. v. Harris*, 124 N. Y. 280, 26 N. E. 541, *Burdick's Cases*, 398.

"A dormant partner has been variously defined as sleeping, silent, not known, not acting, one whose name and transactions as a partner are professedly concealed from the world, one who shares in the profits of a business, but is not known as a member of the firm. In its strictest sense, it may imply both the quality of secrecy and inactivity, but it has been held that, to be such, it is not essential that the dormant partner should wholly abstain from any actual participation in the business of the firm, or be universally unknown as bearing a connection with it. He may act in an advisory manner in the general business of the firm, and it is sufficient if he is not generally known as a partner." *Elmira Iron & Steel Rolling Mill Co. v. Harris*, 124 N. Y. 280, 26 N. E. 541, *Burdick's Cases*, 398, citing *North v. Bloss*, 30 N. Y. 374. A dormant partner is one whose name is not known and does not appear as that of a partner, but who is in fact a silent partner. *Podrasnik v. R. T. Martin Co.*, 25 Ill. App. 300. A partnership is dormant when the name or names of a partner or partners are kept back,—dormant as to all whose names do not appear in its transactions. The dormant, sleeping,

merely a secret partner, and sometimes as meaning a silent or inactive partner, irrespective of whether he is an ostensible or secret partner. As a matter of fact, there is much confusion and inaccuracy in the use of the terms "secret," "silent," and "dormant."¹⁷

Nominal Partners.

A nominal or *quasi* partner is a person who is apparently a partner, but not really one.¹⁸

Incoming Partner.

An incoming partner is one who enters a previously existing firm. But, as will be seen hereafter, the introduction of a new member into an existing firm operates as a dissolution of it, and the institution of a new firm.

Retiring Partner.

A retiring partner is one who leaves an existing firm.

Liquidating Partner.

A liquidating partner is the member of a dissolved partnership who winds up its business.

inactive partner may be known by reputation or declaration of his copartner, but these do not make him an avowed or active one without the avowal and pledge of his name or paper. The principle which makes a dormant partner liable is that, having an interest in the profits, which are part of the fund to which a creditor looks for payment, he shall be bound for claims and losses. When discovered, he is liable as a partner; but then he must be shown to be a partner by an interest in the subject-matter. *Winship v. Bank of U. S.* (1831), 5 Pet. (U. S.) 573-575, Baldwin, J.

¹⁷ See Pars. Partn. § 31.

¹⁸ See *supra*, §§ 32-37, "Partnership as to Third Persons." The term "ostensible partner" has been used in the sense of "nominal partner," and vice versa. See *Harris v. Crary*, 67 Tex. 383. But it is better to confine the term "ostensible" to one who is really a partner, and known as such, and to apply the term "nominal" to one who is not really a partner, but only apparently so.

General and Special Partners.

The terms "general" and "special" partners have reference only to the members of a statutory limited partnership, and will be considered in that connection. The terms have nothing to do with the classification of partnerships into general and special partnerships.

CHAPTER III.

CONTRACT OF PARTNERSHIP.

- 46. General Requisites
- 47. Formalities.
- 48-49. Who may become Partners.
- 50. Consideration.
- 51. Purposes of Partnership.
- 52. Illegal Partnerships.

GENERAL REQUISITES.

- 46. A contract creating a partnership must conform to all rules governing contracts in general.

The general principles of the law of contracts are, of course, fully applicable to contracts of partnership. In this work, therefore, it is unnecessary to do more than point out and illustrate a few of the applications of such principles to the contract of partnership. The construction of contracts with reference to the question whether or not a partnership is created has been sufficiently considered in a preceding chapter, on what constitutes a partnership. The construction of particular provisions in formal contracts, or articles of partnership, is reserved for a later chapter.¹

FORMALITIES.

- 47. No particular forms of expression or formalities of execution are necessary to a valid contract of partnership.

There are no technical terms or forms of expression which must be used to order to constitute an ordinary common law partnership. Any contract which evinces an intention to be

¹ See *infra*, §§ 82, 83.

joint proprietors of the profits of the business to be carried on will constitute a partnership. It is not necessary that the term "partnership," or any similar term, should be used.² Indeed, as has been seen, a contract may create a partnership, though the parties thereto did not contemplate such a result, or even where they have expressly stipulated that a partnership should not result.³ The contract, of course, may be either express, or implied from the acts of the parties.⁴

Necessity of Writing—Statute of Frauds.

In the absence of a statutory provision to the contrary, the contract may be either oral or written.⁵ The statute of frauds, which requires certain classes of contracts to be in

² *Bloomfield v. Buchanan*, 13 Or. 108, 8 Pac. 912; *Marsh v. Davis*, 33 Kan. 326, 6 Pac. 612; *Johnson v. Carter*, 120 Iowa, 355, 94 N. W. 850. It is not necessary to constitute a valid partnership, that the parties should describe themselves as partners, or that they should agree to share the losses. *Fay v. Waldron* (Sup.), 3 N. Y. Supp. 894. The absence of the word "partners" is a circumstance to be considered in determining whether or not the parties intended to be partners. *Rawlinson v. Clark*, 15 Mees. & W. 292.

³ See *supra*, § 13, "Intention the Real Test."

⁴ A partnership is a voluntary association of two or more persons for the purpose of lawful trade, and does not need to be established by demonstration. It may be inferred from facts and circumstances. *Whiting v. Leakin*, 66 Md. 255, 7 Atl. 688. Where there is no written agreement, the question of partnership or not is to be determined largely by other conduct of the parties. *Hayward v. Barron* (Com. Pl.), 19 N. Y. Supp. 383. No express stipulation for providing the profit and loss is necessary, as that is an incident to the prosecution of a joint business. *Bancroft v. Hambly*, 36 C. C. A. 601. "Though there be no express articles of co-partnership, the obligation of a partnership engagement may equally be implied in the acts of the parties." *Ellison v. Stuart*, 2 Pen. (Del.) 179, 43 Atl. 836. "It is true that there were no articles of partnership, nor written contract defining the interests, rights, and obligations of the parties, but they are not essential to the existence of a partnership." *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484.

⁵ *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484; *Marsh v. Davis*, 33

writing, does not require a written contract to create a present partnership. A contract of partnership is not an agreement for the sale of any personal property or those in action, within the meaning of the statute.⁶ The provision of the statute which requires contracts not to be performed within a year, to be evidenced by a note or memorandum in writing, of course, requires a contract for a future partnership to be in writing, where such partnership is not to commence until after a year from the date of the contract.⁷ But, as has been seen, a contract for a future partnership does not constitute the parties partners in the meanwhile.⁸ If the agreement is for a partnership for a longer term than one year, the contract must be evidenced by writing, in order to be binding.⁹

Kan. 326, 6 Pac. 612; *Randel v. Yates*, 48 Miss. 685; *Bopp v. Fox*, 63 Ill. 543; *Smith v. Tarlton*, 2 Barb. Ch. (N. Y.) 336; *Ellison v. Stuart*, 2 Pen. (Del.) 179, 43 Atl. 837; *Somerby v. Buntin*, 118 Mass. 279; *Simmons v. Ingram*, 78 Mo. App. 603; *McCabe v. Sinclair* (N. J. Eq.), 58 Atl. 412.

⁶ *Coleman v. Eyre*, 45 N. Y. 38; *Huntley v. Huntley*, 114 U. S. 394. An oral agreement, by which one person is to contribute his inchoate interest in an invention, and the other furnish the money necessary to make that invention available in the form of a patent, and both are to contribute their services to make it remunerative, is an agreement for a partnership, and not a contract for the sale of goods, wares and merchandise, within the statute of frauds; and the patent, when obtained, is in equity, partnership property, in whosoever name letters patent are taken out. *Somerby v. Buntin*, 118 Mass. 279.

⁷ *Smith v. Tarlton*, 2 Barb. Ch. (N. Y.) 336. See, also, *Whipple v. Parker*, 29 Mich. 369. "But even where there was a parol agreement to enter into a partnership at a future day, and specifying the terms of such copartnership, I apprehend that, if the parties went into copartnership at the prescribed time, without agreeing upon any new terms, the former parol agreement would be presumed to constitute the terms on which such partnership was entered into and carried on." *Smith v. Tarlton*, 2 Barb. Ch. (N. Y.) 337.

⁸ See *supra*, § 24, "Contracts for Future Partnerships."

⁹ *Jones v. McMichael*, 12 Rich. (S. C.) 176; *Morris v. Peckham*, 51 Conn. 128; *Williams v. Jones*, 5 Barn. & Co. 108.

but if the parties have acted upon the agreement, and launched the partnership, they are partners, though, of course, the provision of the oral contract that the firm shall continue for more than a year is not binding, and the firm may be dissolved at any time.¹⁰

The provision of the statute of frauds requiring contracts for an interest in real property to be evidenced by writing, does not require a contract of partnership to be in writing, even though the partnership property consists of realty, and the very purpose of the partnership is to deal in real estate.¹¹ The great weight of authority supports this view, though there are authorities to the contrary.¹² So far as lands acquired after the formation of the firm, is concerned, the interest of each partner is in the nature of a resulting or constructive trust, and it is well settled that such trusts may be established by parol evidence,¹³ the statute of frauds having no application to such trusts, which are created by operation

¹⁰ *Morris v. Peckham*, 51 Conn. 128; *Wahl v. Barnum*, 116 N. Y. 87, 22 N. E. 280; *Huntley v. Huntley*, 114 U. S. 394.

¹¹ *Bopp v. Fox*, 63 Ill. 540; *Fairchild v. Fairchild*, 64 N. Y. 471; *Chester v. Dickerson*, 52 Barb. (N. Y.) 349, 54 N. Y. 1, *Mechem's Cases*, 20; *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 29 Am. St. Rep. 133; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370; *Allison v. Perry*, 130 Ill. 9, 22 N. E. 492; *Carr v. Leavitt*, 54 Mich. 540, 20 N. W. 576; *Richards v. Grinnell*, 63 Iowa, 44, 18 N. W. 668, 50 Am. Rep. 727; *Dale v. Hamilton*, 5 Hare, 369; *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484. The reason assigned in many cases for this rule is that real estate is treated in equity as personal property for all the purposes of the partnership. *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370.

¹² *Raub v. Smith*, 61 Mich. 543, 28 N. W. 676; *Lefevre's Appeal*, 69 Pa. 122; *Everhart's Appeal*, 106 Pa. 349; *Young v. Wheeler*, 34 Fed. 98; *Smith v. Burnham*, 3 Sumn. 435, Fed. Cas. No. 13,019.

¹³ See cases cited *supra*, this section, to the effect that the statute of frauds does not apply. See, also, *Forster v. Hale*, 5 Ves. 309; *Dale v. Hamilton*, 5 Hare, 369, 2 Phil. Ch. 266; *Lefevre's Appeal*, 69 Pa. 125; *Williams v. Gillies*, 75 N. Y. 197; *Smith v. Tarlton*, 2 Barb. Ch. (N. Y.) 336; *Sherwood v. St. Paul & C. Ry. Co.*, 21 Minn. 127; *Marsh v. Davis*, 33 Kan. 326, 6 Pac. 612.

of lay mainly for the prevention of fraud. As to lands which, by the agreement, are to be contributed by one or more partners to the common stock at the institution of the firm, the contract is executed when the relation is entered into, and the statute of frauds has no application to executed agreements.¹⁴ —

WHO MAY BECOME PARTNERS.

48. Any person competent to contract may make a valid contract of partnership.
49. There must be at least two, and, in the absence of statute, there may be any greater number of partners in a single firm.

Aliens.

Citizens of different countries which are at peace with each other may be partners, but an alien enemy can not be a partner, and, if war breaks out between the respective countries of the partners, such partnership is suspended or dissolved.¹⁵

¹⁴ *Hunter v. Whitehead*, 42 Mo. 524; *Personette v. Pryme*, 34 N. J. Eq. 26. In *Marsh v. Davis*, 33 Kan. 326, 6 Pac. 612, the court said that it was immaterial whether real estate was bought with partnership funds for partnership purposes after the formation of the partnership, or whether a part of the real estate was put into the firm as partnership property at the formation of the firm, if the parties have acted upon the agreement, and become partners. In either case, the statute of frauds is not applicable. After the formation of the partnership, an action between the partners in relation to such lands would be founded upon an existing ownership in them, and not upon the contract for an interest in them. Before the formation of the firm, the only action that could be brought would be for failure to launch the partnership. *Pars. Partn.* (4th Ed.) § 6, note d.

¹⁵ *McAdams' Ex'rs v. Hawes*, 9 Bush (Ky.) 15; *Woods v. Wilder*, 43 N. Y. 164; *New York Life Ins. Co. v. Statham*, 98 U. S. 24; *Kershaw v. Kelsey*, 100 Mass. 561.

Infants.

An infant may be a partner, since his contracts are merely voidable, and not void. So long as he does not avail himself of the privilege of rescinding his contracts, he has all the rights and powers of any other partner. He may, however, upon attaining majority, or at any time before, rescind the contract, and thus escape all liability. Upon reaching majority, he may ratify the contract, whereupon he becomes absolutely liable upon all the contracts of the firm. If he intends to disaffirm the contract, he should do so promptly upon arrival at majority, as otherwise he may be held to have elected to ratify the contract.¹⁶ The infant's interest in the firm property remains liable for firm debts, notwithstanding the infant elects to disaffirm, and thereby escapes personal liability.¹⁷ The adult partners cannot take advantage of their copartner's infancy to avoid liability. The privilege is personal to the infant.¹⁸ But the fact that the infant falsely represented himself to be of age is sufficient to entitle the adult partner to a dissolution.¹⁹

Insane Persons.

A contract of partnership, made in good faith with an insane person, in ignorance of his condition, is valid, though it may be set aside, if the parties can be placed in *statu quo*.²⁰

¹⁶ *Continental Nat. Bank v. Strauss*, 137 N. Y. 148, 32 N. E. 1066, *Burdick's Cases*, 619; *Osburn v. Farr*, 42 Mich. 134, 3 N. W. 299; *Bush v. Linthicum*, 59 Md. 344, *Burdick's Cases*, 154; *Bixler v. Kresge*, 169 Pa. 405, 32 Atl. 414, 47 Am. St. Rep. 920, *Burdick's Cases*, 115; *Mehlhop v. Rae*, 90 Iowa, 30, 57 N. W. 650; *Vinsen v. Lockard*, 7 Bush (Ky.) 458; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. 283.

¹⁷ *Bush v. Linthicum*, 59 Md. 344, *Burdick's Cases*, 154; *Yates v. Lyon*, 61 N. Y. 344; *Pelletier v. Couture*, 148 Mass. 269, 19 N. E. 400, and cases cited *supra*, this section.

¹⁸ *Stein v. Robertson*, 30 Ala. 286.

¹⁹ *Bush v. Linthicum*, 59 Md. 344, *Burdick's Cases*, 154.

²⁰ *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Fay v.*

Insanity of a partner does not *ipso facto* operate as a dissolution of the firm, though it may constitute sufficient grounds to justify a court of equity in decreeing a dissolution.²¹

Married Woman.

At common law, a married woman was incapable of entering into a contract, and therefore of becoming a partner, even where she had a separate estate, or where she was judicially separated from her husband, or where her husband was an alien enemy, and abroad.²² By the custom of London, however, a married woman may be a trader, and contract as if she were not married,²³ and a similar custom prevails in South Carolina.²⁴ Under modern statutes, which have very generally removed the disabilities of married women to contract, a married woman may be a partner,²⁵ even with her

Burditt, 81 Ind. 334, 42 Am. Rep. 142; *Menkins v. Lightner*, 18 Ill. 282. None of these were partnership cases.

²¹ *Raymond v. Vaughn*, 17 Ill. App. 144, affirmed in 128 Ill. 256, 21 N. E. 566.

²² Enc. Laws Eng. tit. "Partnership," p. 458; *Brown v. Jewett*, 18 N. H. 230; *McArthur v. Bloom*, 2 Duer (N. Y.) 151. A married woman has not capacity to enter into a general mercantile partnership not connected with or relating to her separate property, and where she assumes to do so with the consent of her husband, and is by him assisted in managing and carrying on the business, the husband, and not the wife, is to be regarded in law as the partner. *Swasey v. Antram*, 24 Ohio St. 87. As to the effect of a partnership entered into during coverture, and continued after the death of the husband, see *Everit v. Watts*, 10 Paige, Ch. (N. Y.) 82.

²³ *Lindl. Partn.* p. 77; *Beard v. Webb*, 2 Bos. & P. 93.

²⁴ *Newbiggin v. Pillans*, 2 Bay (S. C.) 162; *Hobart v. Lemon*, 3 Rich. (S. C.) 131. A married woman may become a feme sole trader in the business of keeping a boarding house. *Dial v. Neuffer*, 3 Rich. (S. C.) 78.

²⁵ *Vail v. Winterstein*, 94 Mich. 230, 53 N. W. 932; *Silveu's Ex'rs v. Porter*, 74 Pa. 448; *Dupuy v. Sheak*, 57 Iowa, 361, 10 N. W. 731; *Orr v. Cooledge*, 117 Ga. 195, 43 S. E. 527. But see *Vannerson v. Cheatham*, 41 S. C. 327, 19 S. E. 614, wherein it is held that a statute providing that a married woman's contracts are valid, except those

husband,²⁶ though it is usually held, even under such statutes, that she cannot enter into partnership with her husband.²⁷ In a recent and well considered case,^{27a} a distinction is made between statutes allowing married women to contract generally and those permitting only contracts as to separate property. Under the former class of statutes, the weight of authority is in favor of the right of a married woman to enter into partnership with her husband.^{27b}

Corporations.

It is *prima facie ultra vires* for a corporation to enter into a partnership with either another corporation or a natural person,²⁸ though of course such power may be expressly con-

to answer for the liability of another, does not authorize her to enter into a partnership, since she would thereby become liable to answer for the liability of another. This decision seems extremely doubtful.

²⁶ *Suan v. Caffé*, 122 N. Y. 308, 25 N. E. 483, *Mechem's Cases*, 40; *Dressel v. Lonsdale*, 46 Ill. App. 454; *Louisville & N. R. Co. v. Alexander*, 16 Ky. L. R. 306, 27 S. W. 981; *Hoaglin v. Henderson*, 119 Iowa, 720, 61 L. R. A. 756. In England, a married woman with a separate estate may be a partner, even with her husband. *Butler v. Butler*, 16 Q. B. Div. 374.

²⁷ *Artman v. Ferguson*, 73 Mich. 146, 40 N. W. 907, *Mechem's Cases*, 37; *Fuller & Fuller Co. v. McHenry*, 83 Wis. 573, 53 N. W. 896; *Bowker v. Bradford*, 140 Mass. 521, 5 N. E. 480; *Plumer v. Lord*, 5 Allen (Mass.) 460; *Payne v. Thompson*, 44 Ohio St. 192, 5 N. E. 654; *Mayer v. Soyster*, 30 Md. 402.

^{27a} *Hoaglin v. Henderson*, 119 Iowa, 720, 61 L. R. A. 756.

^{27b} *Hoaglin v. Henderson*, *supra*; *Burney v. Savannah Grocery Co.*, 98 Ga. 711, 25 S. E. 915; *Lane v. Bishop*, 65 Vt. 575, 27 Atl. 499; *Snell v. Stone*, 23 Or. 327, 31 Pac. 663; *Fuller v. Ferguson*, 26 Cal. 547. To the contrary, see *Seattle Board of Trade v. Hayden*, 4 Wash. 263, 16 L. R. A. 530; *Haggett v. Hurley*, 91 Me. 542, 40 Atl. 561, 41 L. R. A. 362.

²⁸ *Gunn v. Central R. R.*, 74 Ga. 509; *Aurora State Bank v. Oliver*, 62 Me. App. 390; *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 24 N. E. 834; *New York & S. Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa.

ferred by its charter.²⁹ So, a corporation may, in furtherance of the object of its creation, make contracts, though the effect of the contracts may be to impose upon the company the liability of a partner.³⁰

Partnerships.

A firm may enter into a contract of partnership with another firm, or with an individual, and, as between the parties to such contracts, in taking the accounts, making contribution and distribution, etc., the contracting firms are treated as entities, and stand on the footing of any other partner.³¹ But, as the law does not in fact recognize firms as legal entities,³² all the partners in the component firms will be regarded as partners in the joint firm, so far as third persons are concerned, and each will be liable *in solido* for the debts of the joint firm.³³

Number of Partners.

"That a partnership must consist of at least two persons is one of those things which does not need to be established

173; *Mallory v. Hanaur Oil-Works*, 86 Tenn. 598, 3 S. W. 396; *Fechteler v. Palm Bros. & Co.* (C. C. A.), 133 Fed. 462. But see *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 471.

National Bank cannot become a partner. *Merchants' Nat. Bank v. Wehrmann*, 69 Ohio St. 160, 68 N. E. 1004.

²⁹ *Butler v. American Toy Co.*, 46 Conn. 136; *Allen v. Woonsocket Co.*, 11 R. I. 288.

³⁰ *Cleveland Paper Co. v. Courier Co.*, 67 Mich. 152, 34 N. W. 556; *Bissell v. Michigan Southern R. Co.*, 22 N. Y. 258; *Catskill Bank v. Gray*, 14 Barb. (N. Y.) 471; *Jones v. Parker*, 20 N. H. 31.

³¹ *Butler v. American Toy Co.*, 46 Conn. 136; *In re Hamilton*, 1 Fed. 800; *Simonton v. McLain*, 37 La. Ann. 663; *Meador v. Hughes*, 14 Bush. (Ky.) 652; *Bullock v. Hubbard*, 23 Cal. 495; *Gulick v. Gulick*, 14 N. J. Law, 582; *North Pac. Lumber Co. v. Spore*, 44 Or. 462, 75 Pac. 890.

³² See *infra*, c. 4, "Firm as an Entity."

³³ *Meyer v. Krohn*, 114 Ill. 574, 581, 2 N. E. 495; *Beall v. Lowndes*, 4 S. C. 258.

by demonstration."³⁴ In the absence of statute, there is no limit upon the number of persons who may be partners in a single firm.³⁵

CONSIDERATION.

50. The mere agreement of one person to be a partner with another is a sufficient consideration for the agreement of such other to be a partner with him upon whatever terms may be agreed upon.

A contract of partnership must, of course, be supported by a sufficient consideration.³⁶ But, as mutual promises are each a sufficient consideration for the other, the mere agreement of one person to be a partner with another is a sufficient consideration for the agreement of the other to be a partner with him upon whatever terms may be agreed upon between them.³⁷ An agreement to be a partner subjects one to the extensive liabilities of a partner and is a valuable consideration. "Any contribution in the shape of capital or labor, or any act which may result in liability to third persons, is a sufficient consideration to support such an agreement."³⁸ The contributions need not be equal, for the court will not measure the quantum of value, but will leave the parties to determine this for themselves.³⁹ The mere agreement of several persons to be partners is a sufficient consideration to support a stipulation that some of them shall stand the greater part or all of the losses.⁴⁰

³⁴ *Whiting v. Leakin*, 66 Md. 255, 7 Atl. 688.

³⁵ *Pars. Partn.* § 14.

³⁶ *Mitchell v. O'Neale*, 4 Nev. 504.

³⁷ *Coleman v. Eyre*, 45 N. Y. 38; *Belcher v. Conner*, 1 S. C. 88; *Breslin v. Brown*, 24 Ohio St. 565; *Kimmins v. Wilson*, 8 W. Va. 584. But see *Mitchell v. O'Neale*, 4 Nev. 504.

³⁸ *Lindl. Partn.* p. 63.

³⁹ *Per Wigram, V. C.*, in *Dale v. Hamilton*, 5 Hare, 393.

⁴⁰ *Lindl. Partn.* p. 63; *Geddes v. Wallace*, 2 Bligh, 270. But see

Premium.

Sometimes it is agreed that a person shall pay a sum of money for the privilege of being admitted as a partner in an established business. This sum is called a premium or bonus, and belongs individually to the prior owner of the business. In forms no part of the firm assets. In cases of fraud, and total or partial failure of consideration, the premium may be recovered or apportioned.⁴¹

PURPOSES OF PARTNERSHIP.

51. In the absence of statute, a partnership may be formed to transact any lawful business for profit.

It has already been seen that associations not having gain for their object are not partnerships.⁴² The purpose of every partnership must therefore be the transaction of some business for profit. A partnership may be formed for the purpose of any lawful business, commercial or otherwise, such as farming, mining, manufacturing, professional occupations, and the like. It may exist for a single transaction or undertaking,⁴³ though this has been denied.⁴⁴ Though at one time

Brophy v. Holmes, 2 Molloy, 1. The admission of a new partner into an existing firm is sufficient consideration to support an agreement by the incoming partner to assume existing firm debts. *Partn. Partn.* § 336.

⁴¹ See, generally, *Lindl. Partn.* p. 64, and *Partn. Partn.* § 418.

⁴² See *supra*, § 235.

⁴³ *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484; *Spencer v. Jones*, 92 Tex. 516, 50 S. W. 118; *Yeoman v. Lasley*, 40 Ohio St. 190; *Hulett v. Fairbanks*, 40 Ohio St. 233; *Winstanley v. Gleyre*, 146 Ill. 27, 34 N. E. 628; *Plunkett v. Dillon*, 4 Houst. (Del.) 338. To constitute a partnership, it is not necessary that there be a series of transactions between the parties, nor that the relation be continued for a long period of time. It may exist for a single transaction or undertaking. *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484.

⁴⁴ *Carter v. Carter*, 28 Ill. App. 340; *Hurley v. Walton*, 63 Ill. 260.

doubted, it is now settled that a partnership may be formed for the purpose of buying and selling real estate.⁴⁵

SAME—ILLEGAL PARTNERSHIPS.

52. A partnership cannot be created for a purpose prohibited by positive law or public policy.

A contract of partnership for any purpose prohibited by law or public policy is void.⁴⁶ Thus, a partnership for the purpose of smuggling, gambling, making counterfeit money, aiding alien enemies, regulating prices, stifling competition,

"The agreement here contemplated nothing but a single transaction, in the profits of which the parties were jointly interested. Nothing was to be bought by the parties; they were to incur no expenses or debts; they were merely to perform a particular service with reference to a single subject, and share the profit. The elements necessary to constitute a 'partnership,' in the legal sense of that term, are wholly lacking, where the transaction engaged in is but a single adventure, in which there is no property, and no element of loss." *Gottschalk v. Smith*, 54 Ill. App. 344, citing *Hurley v. Walton*, 63 Ill. 260; *Fawcett v. Osborn*, 32 Ill. 411; *Adams v. Funk*, 53 Ill. 219; *Snell v. DeLand*, 43 Ill. 323. The principal case was affirmed in 156 Ill. 377, 40 N. E. 937, holding that an agreement by two persons to obtain from a third person a price for which he will sell his land, and to jointly and separately exert themselves to sell such land at an enhanced price, and divide the profit between them, embracing no other transaction, does not constitute a partnership.

⁴⁵ *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605; *Winstanley v. Gleyre*, 146 Ill. 27, 34 N. E. 628; *Holmes v. McGray*, 51 Ind. 358; *Richards v. Grinnell*, 63 Iowa, 44, 18 N. W. 668; *Pennypacker v. Leary*, 65 Iowa, 220, 21 N. W. 575; *Corey v. Cadwell*, 86 Mich. 570, 49 N. W. 611; *Simpson v. Tenney*, 41 Kan. 561, 21 Pac. 634; *Hunter v. Whitehead*, 42 Mo. 524; *Chester v. Dickerson*, 54 N. Y. 1, *Mechem's Cases*, 20; *Yeoman v. Lasley*, 40 Ohio St. 190; *Hulett v. Fairbanks*, 40 Ohio St. 233; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370; *Spencer v. Jones*, 92 Tex. 516, 50 S. W. 118; *Canada v. Barksdale*, 76 Va. 899; *Sage v. Sherman*, 2 N. Y. 417. But see *Patterson v. Brewster*, 4 Edw. Ch. (N. Y.) 352.

⁴⁶ *McGunn v. Hanlin*, 29 Mich. 476; *Fairbank v. Leary*, 40 Wis.

and the like, is illegal and void.⁴⁷ Partnerships in public offices are against public policy.⁴⁸ Where only some of the partnership purposes or transactions are illegal, if this part can be separated from the legal part, the partnership is not wholly void, but if the two parts can not be separated, the whole is void.⁴⁹

Effect of Illegality.

The courts will not assist the members of an illegal partnership in any way to enforce or carry out their illegal objects. A suit for an accounting of the partnership business cannot be maintained.⁵⁰ Where the business has all been wound up, it has been held that a partner may maintain an ac-

637; *Kelly v. Devlin*, 58 How. Prac. (N. Y.) 487; *Dunham v. Presby*, 120 Mass. 285.

⁴⁷ *Powell v. Maguire*, 43 Cal. 11; *Craft v. McConoughy*, 79 Ill. 346, *Mechem's Cases*, 30; *Tenney v. Foote*, 95 Ill. 99; *Watson v. Murray*, 23 N. J. Eq. 257; *Gaston v. Drake*, 14 Nev. 175; *Davis v. Gelhaus*, 44 Ohio St. 69, 4 N. E. 593; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173.

⁴⁸ *Caston v. Drake*, 14 Nev. 175; *Woodworth v. Bennett*, 43 N. Y. 273; *Forsyth v. Woods*, 11 Wall. (U. S.) 484; *Bowen v. Richardson*, 133 Mass. 293; *Warner v. Griswold*, 8 Wend. (N. Y.) 665; *Hobbs v. McLean*, 117 U. S. 567; *Wolcott v. Gibson*, 51 Ill. 69.

⁴⁹ *Anderson v. Powell*, 44 Iowa, 20; *Northrup v. Phillips*, 99 Ill. 449; *Harvey v. Varney*, 98 Mass. 118; *Dunham v. Presby*, 120 Mass. 285; *Lane v. Thomas*, 37 Tex. 157; *Willson v. Owen*, 30 Mich. 474. See, also, *Central Trust & Safe Deposit Co. v. Respass*, 112 Ky. 606, 56 L. R. A. 479, where illegal items, for betting, were separated in the accounting of a partnership for feeding, training and racing horses.

⁵⁰ *Sykes v. Beadon*, 11 Ch. Ch. 170; *Jackson v. McLean's Ex'rs*, 100 Mo. 130; *Snell v. Dwight*, 120 Mass. 9; *Bartle v. Nutt*, 4 Pet. (U. S.) 184; *Woodworth v. Bennett*, 43 N. Y. 273, *Mechem's Cases*, 25; *Read v. Smith*, 60 Tex. 379. Where the partnership was a legal one, the mere fact that a portion of the profits were derived by cheating customers will not deprive a partner of his right to an account. *Todd v. Pennington* (N. J. Ew. & App.) 21 Atl. 297; *Shriver v. McCloud*, 20 Neb. 474. But compare *Northrup v. Phillips*, 99 Ill. 449.

tion to recover his share of the assets remaining in the hands of his copartner,⁵¹ but the weight of authority is to the contrary.⁵² As to third persons not connected with the illegality, the members of an illegal partnership are liable as any other partners.

⁵¹ *Brooks v. Martin*, 2 Wall. (U. S.) 70; *Attaway v. Third Nat. Bank*, 15 Mo. App. 577; *McGunn v. Hanlin*, 29 Mich. 476; *Crescent Ins. Co. v. Bear*, 23 Fla. 50.

⁵² *Tood v. Rafferty's Adm'rs*, 30 N. J. Eq. 254; *Woodworth v. Bennett*, 43 N. Y. 273; *Patterson's Appeal*, 13 W. N. C. (Pa.) 154; *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. 124; *Tenney v. Foote*, 95 Ill. 99; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173.

CHAPTER IV.

FIRM AS AN ENTITY.

- 53. At Common Law.
- 54-55. Limited Recognition as an Entity.

AT COMMON LAW.

- 53. At common law, a firm is not recognized as a legal entity apart from the members who compose it.

Everyone is familiar with the legal fiction by which a corporation is regarded as a legal person or entity separate and distinct from its members or stockholders. The property, rights, duties, and obligations of a corporation are not the property, rights, duties and obligations of the stockholders. With a partnership, the case is exactly reversed. The firm, as such, is not regarded as having any legal existence¹ apart from the members who compose it. What is called the property of the firm is the property of the individual partners.²

¹ *Jacaud v. French*, 12 East, 317; *Bank of Toronto v. Nixon*, 4 Ont. App. 346; *Ex parte Corbett*, 14 Ch. Div. 122, *Burdick's Cases*, 134; *Hoare v. Oriental Bank*, 2 App. Cas. 589; *In re Wakeham*, 13 Q. B. Div. 43; *Jones v. Blun*, 145 N. Y. 333, 39 N. E. 954. "There is no such thing as a firm known to the law." Per James, L. J., in *Ex parte Corbett*, 14 Ch. Div. 122, *Burdick's Cases*, 134. In Louisiana, which derives its jurisprudence from the civil law, a partnership is recognized as a separate legal entity. *Succession of Pilcher*, 39 La. Ann. 362, 1 So. 929; *Liverpool, B. & R. P. Nav. Co. v. Agar*, 14 Fed. 615.

² "Partnership is but a relation. It is not a person; it is not a legal being. The real owners of partnership property are the partners." *Harris v. Visscher*, 57 Ga. 232. A legacy to a firm belongs

What are called debts of the firm are the debts of the partners.³ Actions to vindicate the rights of the firm must be brought by the individual partners, for such rights are their rights.⁴ The firm, as such, can not sue.⁵ Actions to enforce firm liabilities must be brought against the individuals composing the firm, for it is the individual partners, and not the firm, which is liable.⁶ A partner may be a debtor or creditor of his copartners, but he cannot, in strictness, be a debtor or creditor of the firm.⁷ The firm is not such a legal entity as may be either a debtor or a creditor. Any change

to the individuals composing the firm at the time the legacy vests. *Stubbs v. Sargon*, 2 Keen, 255. Firm property may be seized on execution for the private debt of a partner, because it is, in part, at least, his property. See *infra*, c. 7.

³ The private property of a partner may be seized on execution for a firm debt, because it is the debt of such partner. See *infra*, c. 7.

⁴ See *infra*, c. 10, "Actions."

⁵ By statutes in some states, firms are authorized to sue and be sued in their firm name. See *infra*, c. 10.

⁶ See *infra*, c. 10, "Actions."

⁷ *Richardson v. Bank of England*, 4 Mylne & C. 171, 172; *De Tastet v. Shaw*, 1 Barn. & Ald. 664. A debt between the firm and a partner cannot be legally enforced until the partnership affairs are settled. It is merely an item in the partnership accounts, and can be enforced against the other partners only upon final settlement. See *infra*, c. 10, "Actions." "But though these terms, 'creditor' and 'debtor,' are so used, and sufficiently explain what is meant by the use of them, nothing can be more inconsistent with the known law of partnership than to consider the situation of either party as in any degree resembling the situation of those whose appellation has been so borrowed. The supposed creditor has no means of compelling payment of his debt; and the supposed debtor is liable to no proceedings either at law or in equity—assuming always that no separate security has been taken or given. The supposed creditor's debt is due from the firm of which he is a partner, and the supposed debtor owes the money to himself, in common with his partners, and, pending the partnership, equity will not interfere to set right the balance between the partners. Indeed, it could not do so with effect, inasmuch as, immediately after a decree has enforced payment of the money supposed to be due, the party paying might, in

in membership destroys the identity of the firm, and, if the business is carried on, the partners are regarded as constituting a new firm.⁸ This nonrecognition of the firm as a legal person or entity is one of the most marked differences between partnerships and corporations.⁹

LIMITED RECOGNITION AS AN ENTITY.

54. For convenience, where only the collective rights and liabilities of all the partners need be considered, the firm may be, and is, treated as a legal entity.
55. To a limited extent, statutes in some states deal with a firm as a legal entity.

Notwithstanding the nonrecognition of the firm as a distinct legal entity, it is highly convenient, if not indispensable, for many purposes, to personify the firm, and this is not improper. In thinking and speaking, it is usual, whenever the collective rights and liabilities of the partners is the only immediate thing that need be considered, to use the terms "firm" or "the partnership" as a symbol to designate the aggregate whole, as distinguished from the individual partners. After the rights and liabilities of the "firm" as an aggregation or "entity" are determined, it is easy to interpret the result in terms of individual rights and liabilities, if necessary. In other words, the notion of the firm as an entity performs much the same office in law and business as algebraic symbols do in mathematics. It is merely a convenient mode of expression, which simplifies business operations and legal rea-

exercise of his power of a partner, repossess himself of the same sum." *Richardson v. Bank of England*, 4 Mylne & C. 171.

⁸ See *infra*, c. 11, "Dissolution." See *Abat v. Penny*, 19 La. Ann. 289; *Haskins v. D'Este*, 133 Mass. 356, *Burdick's Cases*, 135.

⁹ *Lindl. Partn.* p. 112.

soning.¹⁰ Accordingly, we find courts and lawyers, as well as business men, frequently speaking of a firm as a entity, having its own property creditors, and the like,¹¹ but this is only in the sense just explained, and means no more than that the partners, as such, have certain special rights and liabilities, which must be worked out through their partnership relation.¹² In keeping partnership accounts, or in marshalling assets of an insolvent firm, it is constantly regarded as an entity.¹³ Business men generally regard a firm as an entity, much as the law regards a corporation, and, for this reason, the view that a firm is an entity is often called the "mercantile," as distinguished from the "legal," view.

Statutory Recognition of Firm as Entity.

The tendency of legislation and decision is in the direction of a wider recognition of the character of the firm as an entity. Statutes in many states permit firms to sue and be sued in the firm name. Property of the firm is sometimes

¹⁰ In *Pooley v. Driver*, 5 Ch. Div. 460, Sir. George Jessel, speaking of the partners as agents, said: "You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners."

¹¹ *Walker v. Wait*, 50 Vt. 668; *Curtis v. Hollingshead*, 14 N. J. Law, 403, *Burdick's Cases*, 285; *In re Haine's Estate*, 176 Pa. 354, 35 Atl. 237; *Burdick's Cases*, 482; *Melly v. Wood*, 71 Pa. 488; *Cross v. Burlington Nat. Bank*, 17 Kan. 336; *Robertson v. Corsett*, 39 Mich. 777; *Fitzgerald v. Grimmell*, 64 Iowa, 261, 20 N. W. 179; *Henry v. Anderson*, 77 Ind. 361.

¹² *Meehan v. Valentine*, 145 U. S. 611, 623, *Burdick's Cases*, 80, *Meehan's Cases*, 103; *Bank of Buffalo v. Thompson*, 121 N. Y. 280, 24 N. E. 473, *Burdick's Cases*, 286.

¹³ *Jones v. Blun*, 145 N. Y. 333, 39 N. E. 954; *In re Haine's Estate*, 176 Pa. 354, 35 Atl. 237, *Burdick's Cases*, 482. In keeping partnership accounts, the firm is made debtor to each partner for what he brings into the stock, and each partner is made debtor to the firm for all that he takes out of the stock. *Lindl. Partn.* p. 110.

assessed for taxation as that of the firm, instead of as that of the individual members. Chattel mortgages executed by a firm may be filed at its principal place of business.¹⁴

¹⁴ Paige, Cas. Partn. p. 111, note; Hubbardston Lumber Co. v. Covert, 35 Mich. 255; Robinson v. Ward, 13 Ohio St. 293; Williams v. City of Saginaw, 51 Mich. 120, 16 N. W. 260; Stockwell v. Inhabitants of Brewer, 59 Me. 286; Hoadley v. County Commissioners, 105 Mass. 519.

CHAPTER V.

FIRM NAME AND GOOD WILL.

- 56. Necessity of Firm Name.
- 57-58. Use and Purpose of Firm Name.
- 59-60. What Name may be Adopted.

NECESSITY OF FIRM NAME.

- 56. It is not necessary that a firm should have a firm name.

Although persons forming a partnership usually adopt a firm name under which to transact the partnership business, it is not at all essential that they should do so. A partnership may, and frequently does, exist and do business without any firm name.¹ The law frequently declares persons to be partners as the legal result of a contract between them, although they had not supposed that they were partners, and, of course, had not adopted a firm name.² As has been seen, the firm is not an entity, but its property and business is the property and business of the individuals who compose it. There is, therefore, nothing to prevent the partners from transacting the partnership business in their own individual names, if they see fit.³

¹ Ontario Bank v. Hennessey, 48 N. Y. 545; Haskins v. D'Este, 133 Mass. 356, Burdick's Cases, 135; Kitner v. Whitlock, 88 Ill. 513; Pursley v. Ramsey, 31 Ga. 403; Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994; Johnson v. Carter, 120 Iowa, 355. 94 N. W. 850.

² See chapter 1, "What Constitutes a Partnership."

³ McGregor v. Cleveland, 5 Wend. (N. Y.) 475; Kitner v. Whitlock,

USE AND PURPOSE OF FIRM NAME.

57. A firm name is used as a convenient symbol to designate all the partners collectively, and show that the transaction was intended as a firm, and not an individual, transaction.
58. Where there is a firm name, it should be used in all the business transactions of the firm except—

Exception—Conveyances of real property.

Although a partnership may exist without a firm name, even where there are formal articles of partnership, the convenience of having a firm name is so great as to be almost a necessity. The convenience, if not the necessity, of considering the firm as an entity for certain purposes, has already been pointed out. The firm name is the symbol of this notional entity.⁴ As a general rule, where a firm name has been adopted, all the partnership business may and should be transacted in the firm name. The use of a firm name raises a *prima facie* presumption that there is a partnership, and that the transaction was a partnership transaction.⁵ Con-

88 Ill. 513; Getchell v. Foster, 106 Mass. 42; Austin v. Williams, 2 Ohio, 61; Crozier v. Kirker, 4 Tex. 252, 51 Am. Dec. 724.

⁴ The firm name is simply a convenient abbreviation of the individual names of all the partners, and, when used, has the same effect as if no firm name had been adopted, and the name of each partner had been signed in full as a partner. Haskins v. D'Este, 133 Mass. 356, Burdick's Cases, 135.

⁵ Haskins v. D'Este, 133 Mass. 356, Burdick's Cases, 135; Ferris v. Thaw, 5 Mo. App. 279; Whitlock v. McKechnie, 1 Bosw. (N. Y.) 427; Armstrong v. Robinson, 5 Gill & J. (Md.) 412; Charman v. Henshaw, 15 Gray (Mass.) 293. But compare Brennan v. Pardridge, 67 Mich. 449. But in Robinson v. Magarity, 28 Ill. 423, it was held that there is no presumption that a firm name includes more than one person. The signing of the firm name to a promissory note by

veyances of real property constitute a notable exception to this rule. "The legal title to real estate can be held only by a person or a corporate entity which is deemed such in law; and therefore a partnership can not, as such, take and hold such legal title."⁶ But "where the style of a partnership is inserted as grantee, and it contains the name or names of one or more of the partners, there is no reason why the title should not vest in the partners so named, and the authorities are to the effect that it would."⁷ Of course, such partner would hold the title in trust for the benefit of all the partners.

Ordinarily, where the partners have adopted a firm name, one partner has no power to bind the firm by contracts executed in any other name;⁸ but if all the partners join in the contract, they may bind the firm in their individual names, even though there is a firm name,⁹ and perhaps even one part-

a member of the firm makes the note *prima facie* the note of the co-partnership, and binds all the members of the firm. *Lamwersick v. Boehmer*, 77 Mo. App. 136. An estimate submitted for a public contract purported by its title to be made by W. & D., under the name and style of "D., W. & Co." It was subscribed by each individual name, and also by the firm name. It was held that it was to be treated as a partnership act, and not as that of individual partners. *People v. Croton Aqueduct Board*, 5 Abb. Prac. (N. Y.) 316, 6 Abb. Prac. (N. Y.) 42, 26 Barb. (N. Y.) 240.

⁶ *Gille v. Hunt*, 35 Minn. 357, 29 N. W. 2; *Adams v. Church*, 42 Or. 270, 70 Pac. 1037, 95 Am. St. Rep. 740. See, also, *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497.

⁷ *Gille v. Hunt*, 35 Minn. 357, 29 N. W. 2. See, also, chapter 7, "Partnership Property."

⁸ *Gordon v. Bankard*, 37 Ill. 147; *Tilford v. Ramsey*, 37 Mo. 563; *Kirby v. Hewitt*, 26 Barb. (N. Y.) 607; *Palmer v. Stephens*, 1 Den. (N. Y.) 471; *McLinden v. Wentworth*, 51 Wis. 170, 8 N. W. 118, 192; *Clark v. Houghton*, 12 Gray (Mass.) 38. A receipt signed by one partner in his own name is binding upon the firm. *Byington v. Gaff*, 44 Ill. 510; *Brown v. Lawrence*, 5 Conn. 397; *Bisel v. Hobbs*, 6 Blackf. (Ind.) 479. The execution of a mortgage of personal property of a partnership by one partner in his individual name passes no title. *Clark v. Houghton*, 12 Gray (Mass.) 38.

⁹ *Kitner v. Whitlock*, 88 Ill. 513; *Iddings v. Pierson*, 100 Ind. 418;

ner could bind the firm by signing the true names of all the partners.¹⁰ Where there is no firm name, it is not necessary to use the names of all the partners, for a principal is bound by contracts made in the name of the agent.¹¹ A partner may use his own name, and bind the firm,¹² though, in such a case, the contract would be *prima facie* the individual contract of such partner, and it would have to be shown that it was a partnership matter, in order to bind the firm, whereas, if a firm name had been used, the contract would have been *prima facie* a firm obligation.¹³ Any name will bind the firm, where it appears that such was the intention.¹⁴ A partnership may have several names, in which case it is bound by contracts made in either name.¹⁵ The fact that the same per-

McGregor v. Cleveland, 5 Wend. (N. Y.) 475; Patch v. Wheatland, 8 Allen (Mass.) 102; Crouch v. Bowman, 3 Humph. (Tenn.) 209; Grollman v. Lipsitz, 43 S. C. 329, 21 S. E. 272.

¹⁰ Per Maule, J., in Norton v. Seymour, 3 C. B. 794. In McGregor v. Cleveland, 5 Wend. (N. Y.) 475, F. C. and R. C. being in partnership, F. made a note signing it "F. C. and R. C.," coupling the two names together. This was held sufficient, as a partnership signature, to bind R., there being no proof as to what was the style of their firm, except that in two instances the name of "F. & R. C." was used.

¹¹ See, also, *infra*, this section.

¹² Sage v. Sherman, 2 N. Y. 417; Ontario Bank v. Hennessey, 48 N. Y. 545. The firm is bound where a partner signs his own name, and adds the suffix "& Co." Austin v. Williams, 2 Ohio, 61; Drake v. Elwyn, 1 Caines (N. Y.) 184. See, also, Baring v. Crafts, 9 Metc. (Mass.) 380.

¹³ Macklin's Ex'r v. Crutcher, 6 Bush (Ky.) 401. See, also, *supra*, this section.

Where a note is executed by and in the name of one partner, if the lender did not know of the partnership, or if the money was loaned on the individual credit of the maker of the note, the fact that the money was applied to the business of the firm does not make it a firm debt. National Bank v. Ingraham, 58 Barb. (N. Y.) 290.

¹⁴ Holland v. Long, 57 Ga. 36; Brown v. Pickard, 4 Utah, 292; Kinsman v. Castleman, 1 T. B. Mon. (Ky.) 210.

¹⁵ Hunt v. Semonin, 79 Ky. 270; Moffat v. McKissick, 8 Baxt. (Tenn.) 517; Michael v. Workman, 5 W. Va. 391. See, also, McGregor v. Cleveland, 5 Wend. (N. Y.) 475.

sons, as partners, conduct their business at different places under different names, does not constitute them partners in different firms. The partners are the firm, and they are bound by contracts in either name.¹⁶ So, by consent or by acquiescence in the use of a name other than the one originally adopted, a partner may be authorized to bind the firm in such manner.¹⁷ Where the firm has received the benefit of a contract made on its credit, it is bound, no matter what name is used.¹⁸

WHAT NAME MAY BE ADOPTED.

59. In the absence of statutory regulation, the partners may adopt any name they see fit as a firm name.
60. In several states, statutes exist regulating, to some extent, the use of firm names.

In Absence of Statute.

Unless restrained by statute, the partners may adopt any name they please as a firm name.¹⁹ The name is wholly a

¹⁶ *Campbell v. Colorado Coal & Iron Co.*, 9 Colo. 60; *Wright v. Hooker*, 10 N. Y. 51; *Anderson v. Norton*, 15 Lea (Tenn.) 14; *In re Williams*, 3 Woods, 493, Fed. Cas. No. 17,707.

¹⁷ *Palmer v. Stephens*, 1 Den. (N. Y.) 471; *Miffin v. Smith*, 17 Serg. & R. (Pa.) 165; *Williamson v. Johnson*, 1 Barn. & C. 146; *Folk v. Wilson*, 21 Md. 538.

¹⁸ *Miner v. Downer*, 20 Vt. 466; *Macklin's Ex'r v. Crutcher*, 6 Bush. (Ky.) 401; *Morse v. Richmond*, 97 Ill. 303; *Bancroft v. Haworth*, 29 Iowa, 462; *Farmers' Bank v. Bayliss*, 41 Mo. 274; *Weaver v. Tapscott*, 9 Leigh (Va.) 424. It is bound by a contract made in the name of one partner, if the credit was extended to the firm and not solely to such partner. *Van Reimsdyk v. Kane*, 1 Gall. 630, Fed. Cas. No. 16,872. So, it is bound where the partner signs his own name, with the addition of "as trustee," to an authorized contract. *Morse v. Richmond*, 97 Ill. 303.

¹⁹ *Manhattan Brass & Mfg. Co. v. Sears*, 45 N. Y. 797; *Crawford v. Collins*, 45 Barb. (N. Y.) 269; *Nichols v. White*, 41 Hun (N. Y.) 152;

matter of convention.²⁰ It may be a purely fanciful name.²¹ It may contain some or all of the names of the actual partners, or it need not contain any, or it may contain the names of persons who are not partners.²² The name of one partner may be used as a firm name,²³ though this would seem to sacrifice much of the convenience of having a firm name, as it

Maugham v. Sharpe, 17 C. B. (N. S.) 443, *Burdick's Cases*, 160; *Wright v. Hooker*, 10 N. Y. 51; *Edgerton v. Preston*, 15 Ill. App. 23; *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 229; *Pollock, Partn. art. 11*.

²⁰ *Edgerton v. Preston*, 15 Ill. App. 23.

²¹ *Lauferty v. Wheeler*, 11 Daly (N. Y.) 194; *Gay v. Seibold*, 97 N. Y. 472; *Kahn v. Thomson*, 113 Ga. 957, 39 S. E. 322.

²² *Shain v. Du Jardin* (Cal.) 38 Pac. 529, *Burdick's Cases*, 138; *Pollock, Partn. art. 11*. A partnership may be called the "Union Towing Co.," and the partners may sue in their individual names upon a contract made with them in that name. *Crawford v. Collins*, 45 Barb. (N. Y.) 269, 30 How. Prac. (N. Y.) 398.

"Partnerships are generally carried on in the names of the partners, and, when only one name is used, the words 'and company' are usually annexed to indicate that other persons are interested in the business. Partnerships are sometimes carried on under the names of persons who are dead, but who, in their lifetime, had established an extensive business, and a high reputation for integrity and fidelity in trade. Any name assumed and used by persons doing business together in the relation of partners becomes a legitimate name and style of the firm, although it may not contain the individual name of any of the partners." *Oppenheimer v. Clemmons*, 18 Fed. 887.

²³ *Bank of Rochester v. Monteath*, 1 Den. (N. Y.) 402; *Wright v. Hooker*, 10 N. Y. 51; *Palmer v. Stephens*, 1 Den. (N. Y.) 471; *Kirk v. Blurton*, 9 Mees & W. 284; *Manufacturers' & Mechanics' Bank v. Winship*, 5 Pick. (Mass.) 11; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529. Where the members of a copartnership agree that the business of the concern shall be carried on by and in the name of the copartners, such name, for the purpose of the business of the firm, is its copartnership name, and by it the several members are bound. So where the copartners agree that the business shall be carried on by and in the name of an individual not himself interested, his name is the copartnership name, and is binding upon the firm when used in its business. *Bank of Rochester v. Monteath*, 1 Den. (N. Y.) 402.

would be necessary to show that a contract in such name was made on behalf of the firm, and on its credit, in order to bind the firm; it being *prima facie* the individual contract of the partner in whose name it was made.²⁴

Statutory Regulation.

Statutory provisions regulating the use of firm names exist in many states.²⁵ In some states, it is forbidden by statutes to use, in the firm name, the name of a former partner without his consent,²⁶ or, more generally, the name of any one not a partner, or the suffix "& Co.," unless such suffix stands for an actual partner, who is not otherwise named.²⁷ So, also, the use of a name appropriate to a corporation is some-

²⁴ *Macklin's Ex'r. v. Crutcher*, 6 Bush (Ky.) 401; *Oliphant v. Mathews*, 16 Barb. (N. Y.) 608; *Mechanic's & Farmer's Bank v. Dakin*, 24 Wend. (N. Y.) 411. Where the firm name is the individual name of one partner, a note executed by and in the name of such partner is *prima facie* his individual obligation. *National Bank v. Ingraham*, 58 Barb. (N. Y.) 290. Bills drawn upon and accepted by the partner whose name is so used will be recoverable against the firm in the absence of proof that such partner also carried on business on his private account. *Bank of Rochester v. Monteath*, 1 Den. (N. Y.) 402, followed by *Wright v. Hooker*, 10 N. Y. 51. To same effect, *Palmer v. Stephens*, 1 Den. (N. Y.) 471.

Where no firm name is adopted, but the partners intend that all the business of the firm shall be done in the name of one partner, transactions by such partner on joint account, and within the authority confided to him, are binding upon all, even if his agency is not disclosed to the persons with whom he deals. *Getchell v. Foster*, 106 Mass. 42.

²⁵ See the codes and statutes of the various states. See, also, *Yale v. Taylor Mfg. Co.*, 63 Miss. 598; *Loeb v. Morton*, 63 Miss. 280; *Quin v. Myles*, 59 Miss. 375.

²⁶ *Arnstaedt v. Blumenfeld*, 13 Daly (N. Y.) 354; *Rogers v. Taintor*, 97 Mass. 291; *Sohier v. Johnson*, 111 Mass. 238. A former partner is entitled to an injunction to prevent the use of his name, and to compensation for any loss suffered, but not to an account of the profits made from the unauthorized use of his name. *Lawrence v. Hull*, 169 Mass. 250, 47 N. E. 1001.

²⁷ *Swords v. Owen*, 43 How. Prac. (N. Y.) 176; *Kennedy v. Budd*, 5 App. Div. (N. Y.) 140; *Wolfe v. Joubert*, 45 La. Ann. 1100, 13 So.

times prohibited.²⁸ Firms doing business under fictitious names, or names not showing the names of the partners, are sometimes required by statute to make and file with a designated officer a certificate stating the names and residences of all the partners.²⁹ The object of these statutory regulations is the prevention of fraud upon persons dealing with the firm, and such statutes should not be extended further than necessary for this purpose.³⁰

Exclusive Right of Firm to Trade Name.

Where a particular name under which a business is carried on by any person, firm, or company has become associated with and appropriated to that business, no other person may carry on a like business under the same name, or a name only colorably different therefrom, in a manner calculated to deceive customers by leading them to believe that they are dealing with such person, firm, or company.³¹

806; Zimmerman v. Erhard, 83 N. Y. 74, 38 Am. Rep. 396; Lunt v. Lunt, 8 Abb. N. C. (N. Y.) 76; Sparrow v. Kohn, 109 Pa. 359, 2 Atl. 498.

²⁸ See Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339; Pollock, Partn. art. 10.

²⁹ Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659; Swope v. Burnham, 6 Okl. 736, 52 Pac. 924. The firm name, "Hirsh Bros.," is not a fictitious name, and sufficiently designates the persons constituting the partnership, and hence is not within the statute. Cochran v. Hirsch Bros., 4 Ohio N. P. 34.

³⁰ Wood v. Erie Ry. Co., 72 N. Y. 196; Thompson v. Gray, 11 Daly (N. Y.) 183; Gay v. Siebold, 97 N. Y. 472; Kennedy v. Budd, 5 App. Div. (N. Y.) 140; Sparrow v. Kohn, 109 Pa. 359, 2 Atl. 498. But compare Lane v. Arnold, 13 Abb. N. C. (N. Y.) 73. The intent of the statute is to prevent a firm from inducing a false credit on the strength of an unauthorized name, but not to prevent the giving of credit, nor to furnish a debtor of an offending firm with a defense. Wolfe v. Joubert, 45 La. Ann. 1100, 13 So. 806; Kennedy v. Budd, 5 App. Div. (N. Y.) 140.

³¹ Pollock, Partn. art. 11. The principle stated in the text is not peculiar to the law of partnership. It belongs more properly to that branch of the general law of ownership which deals with trademarks and other analogous rights. *Id.*

GOODWILL.

While the good will of a partnership embraces more than the right to use the firm name, it differs little in other respects from the good will of individuals, which is beyond the scope of the present work.³² On dissolution the right of a retiring partner to inaugurate a competing business depends on the contract of the parties, contained in the articles of partnership or subsequently made to the same extent as if the partnership relation had never existed.

³² Partnership good-will and the means of making it productive after the death of a partner is discussed in a monographic note to *Slater v. Slater*, 96 Am. St. Rep. 605, 175 N. Y. 143, 60 N. E. 934.

The points relating to the good-will of a partnership business are summarized by Lindley on Partnership (6th Ed. p. 445) as follows: "The salable value of the good-will of a partnership business, whatever that value may be, must be considered as belonging to the firm, unless there is some agreement to the contrary, and it follows from this: (1) That, if a firm is dissolved and there is no agreement to the contrary, the good-will must be sold for the benefit of all the partners, if any of them insist on such sale. *Pawsey v. Armstrong*, 18 Ch. Div. 698, *Burdick's Cases*, 90; *Bradbury v. Dickens*, 27 Beav. 53. (2) That, so far as possible, having regard to the right of every partner to carry on business himself, the court will, on a dissolution, interfere to protect and preserve the good-will until it can be sold. See *Turner v. Major*, 3 Giff, 442. (3) That, if a partner has himself obtained the benefit of the good-will, he can be compelled to account for its value, i. e., for what it would have sold for, he being himself at liberty to compete in business with the purchaser. *Smith v. Everett*, 27 Beav. 446; *Mellersh v. Keen*, 27 Beav. 236, 28 Beav. 453."

In case of the death of a partner, there is no survival of the good-will, but if the surviving partner carries on the business, he must account to the representatives of the deceased partner for the value of the good-will. *Dougherty v. Van Nostrand*, 1 Hoff. Ch. (N. Y.) 68; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Holden v. McMakin*, 1 Pars. Sel. Cas. (Pa.) 270. See *Woerner's Admn.* (3d Ed.) § 127. When a partner retires from the business, assenting to the retention or the place of business by the other partners, and the future conduct of the business by them under the old name, the good-will remains with them as a matter of course. *Menendez v. Holt*, 128 U. S.

USE OF FIRM NAME AFTER DISSOLUTION.

- 60a. The right to use the firm name is a part of the assets. It does not inure to a continuing or surviving partner, but is to be accounted for as an asset.
- 60b. It dies with the last surviving partner and does not pass to his personal representative.
- 60c. A continuing partner having purchased the good will is entitled to the exclusive use of the firm name.
- 60d. In the absence of any agreement as to good will either partner may use the firm name in any manner which does not involve the other in liability.

It was at one time held that the good will in the firm name descended to the surviving partner on principles of joint tenancy,³³ but it is now well settled that it is partnership property in which the estate of a deceased partner is entitled to share, and for which a retiring partner is entitled to compensation.³⁴

514, 522. As a general rule, and in the absence of express contract, there is not, in a professional partnership, as between solicitors, any partnership asset which is capable of being sold or valued as the good-will of the partnership business. *Arundell v. Bell*, 52 L. J. Ch. 537, 49 Law Times (N. S.) 345, 31 Wkly. Rep. 477, 19 Eng. Rul. Cas. 657. This accords with the view expressed by Judge Story: "It seems that good-will can constitute a part of the partnership effects or interests only in cases of mere commercial business or trade, and not in cases of professional business, which is almost necessarily connected with personal skill and confidence in the particular partner." Story, *Partn.* (7th Ed.) § 99. And in *McCall v. Moschcowitz*, 10 N. Y. Civ. Proc. R. 107, the court said that the good-will of a millinery business, which depends largely upon the skill of one of the partners, is no more the property of the copartnership or the subject of sale than would be the good-will of an attorney's business or that of an artist.

³³ *Hammond v. Douglass*, 5 Ves. 539.

³⁴ *Platt v. Platt*, 42 Conn. 330; *Dougherty v. Van Nostrand*, 1 Hoff. Ch. (N. Y.) 68; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Slater v*

It is, however, so connected with the partnership that it dies with the last surviving partner, and does not pass to his personal representative.³⁵

On the retirement of a partner without any agreement as to good will, either has the right to use the firm name in any manner not involving the other in liability.³⁶ But the good will in the firm name being as has been seen an asset, if the continuing partner purchase it as such he will be protected in its exclusive use.³⁷

Subject to the limitation that he shall not use it in such manner as to lead the public to believe that the retiring partner is still connected with the firm,³⁸ a surviving partner is, of course, entitled to the firm name while settling the affairs of the late partnership.³⁹ And if he continues the business he stands in the same position as a continuing partner.⁴⁰

Slater, 175 N. Y. 143, 60 N. E. 934, 96 Am. St. Rep. 605, 61 L. R. A. 796. See, however, *Kirkman v. Kirkman*, 20 Misc. 211, 45 N. Y. Supp. 377, which seems to draw a distinction between good-will and right to use firm name.

³⁵ *Fisk v. Fisk*, 77 App. Div. 83, 79 N. Y. Supp. 37.

³⁶ *Burchell v. Wilde*, 82 Law T. (N. S.) 576; *Cottrell v. Babcock Printing Press Mfg. Co.*, 54 Conn. 122; *Banks v. Gibson*, 34 Beav. 566.

³⁷ *Rogers v. Taintor*, 97 Mass. 291; *Adams v. Adams*, 7 Abb. N. C. (N. Y.) 292. And see *Steinfeld v. National Shirt Waist Co.*, 99 App. Div. 286, 90 N. Y. Supp. 964. "Upon the expiration of a partnership between two persons, the partner who has purchased the good-will and assets of the business under the terms of the articles of partnership can restrain his former partner from soliciting the customers of the old firm, although the articles contain a proviso that nothing therein contained shall prevent either partner from starting a similar business in the neighborhood after the expiration of the partnership. Such a proviso only expresses what the law would have implied." *Gillingham v. Beddow*, 69 Law J. Ch. 527, 2 Ch. Div. [1900] 242, 82 Law J. (N. S.) 791, 64 J. P. 617.

³⁸ *Hallett v. Cumston*, 110 Mass. 29; *McGowan Bros. Pump & Mach. Co. v. McGowan*, 22 Ohio St. 370.

³⁹ *Commercial Nat. Bank v. Proctor*, 98 Ill. 558.

⁴⁰ *Bank v. Gibson*, 34 Beav. 566.

CHAPTER VI.

CAPITAL OF FIRM.

- 61. Definition and Nature.
- 62. What may be Contributed.
- 63-65. Rights of Partners.

DEFINITION AND NATURE.

61. The capital of a firm is the aggregate of the amounts to be contributed by the partners as the basis of beginning or continuing the partnership business.¹

By the capital of a partnership is meant the aggregate of the sums contributed by its members for the purpose of commencing and carrying on the partnership business, and intended to be risked by them in that business.² Partnership capital, of course, belongs to the firm, or all the partners jointly and is partnership property,³ but the two terms, "partnership capital," and "partnership property," are not syn-

¹ Bates, Partn. § 251.

² Lindl. Partn. p. 320; *Topping v. Paddock*, 92 Ill. 92. A premium paid as a consideration for admission to a business as a partner is not a contribution to capital. *Evans v. Hanson*, 42 Ill. 234.

³ *Taft v. Schwamb*, 80 Ill. 289, *Burdick's Cases*, 577; *Nutting v. Ashcroft*, 101 Mass. 300; *Clements v. Jessup*, 36 N. J. Eq. 569; *Malley v. Atlantic F. & M. Ins. Co.*, 51 Conn. 22; *Smith v. Small*, 54 Barb. (N. Y.) 223; *Whitcomb v. Converse*, 119 Mass. 38, *Burdick's Cases*, 575, *Mechem's Cases*, 492; *Hiscock v. Phelps*, 49 N. Y. 97; *Clark's Appeal*, 72 Pa. 142. As to the nature of a partner's interest in firm property, whether as joint tenant, tenant in common, or otherwise, see *infra*, c. 7.

onymous, and it is important to distinguish between them. Partnership property includes everything belonging to the firm, and its amount may vary from day to day, while the partnership capital is a sum fixed by the agreement of the partners, and does not vary, though of course it may be impaired by losses. The capital of each partner is not necessarily the same as such partner's share of the firm assets, for this share may be either greater or less than his capital, according to whether the business has resulted in profits or losses while the capital as has been said, always remains fixed.⁴ "Moreover, the capital of each partner is not necessarily the amount due to him from the firm, for not only may he owe the firm money, so that less than his capital is due him, but the firm may owe him money in addition to his capital, e. g., for money advanced by him to the firm by the way of loan, and not intended to be wholly risked in the business."⁵

WHAT MAY BE CONTRIBUTED.

- 6a. Partnership capital may consist of anything of value which the partners agree to contribute and receive as capital.

The contributions of the different partners to the capital of the firm are governed wholly by the agreement between them. The contributions may be either in money or real or personal property, or some partners may contribute money,

⁴ Undrawn and accumulated profits do not constitute capital. *Dean v. Dean*, 54 Wis. 23, 11 N. W. 239. But see *Raymond v. Putnam*, 44 N. H. 160, wherein undrawn profits were allowed to be added to the original capital. The articles of partnership in this case expressly provided that any partner might either increase or diminish his capital at pleasure.

⁵ *Lindl. Partn.* p. 320.

and some property. Instead of property, the mere use of property owned by one or more partners individually, may be contributed as capital.⁶ The contributions of the different partners may be equal or unequal, or some may contribute nothing whatever to the capital.⁷ It is sometimes said that a partner's capital may consist of his time, labor, and skill in the partnership business. This may, indeed, form the consideration for the contract of partnership between him and the other partners, but it cannot properly be called capital, and it gives him no right in the ultimate distribution of the capital between the partners.⁸ In determining the amount of a partner's contribution, any incumbrances or liens thereon must be taken into account.⁹

RIGHTS OF PARTNERS.

63. The capital of a partner cannot be either increased or diminished during the continuance of the partnership, without the consent of all the partners.
64. Upon dissolution, the capital is to be returned to the partners contributing it, in the proportions in which it was contributed.
65. Where there is nothing to show the amount, the various contributions will be presumed to have been equal.

⁶ *Murphy v. Warren*, 55 Neb. 215, 75 N. W. 573. "There can be no doubt, in view of the numerous decisions to that effect, that the capital of a firm 'may consist of the mere use of the property owned by one member of the firm.'" *Whiting v. Leakin*, 66 Md. 255, 7 Atl. 688, citing *Citizens' Fire Ins. etc. Co. v. Doll*, 35 Md. 106; *Ward v. Thompson*, 22 How. (U. S.) 330.

⁷ The mere agreement to be a partner, and as such subject to the claims of third persons, is a sufficient consideration for a contract of partnership. See *supra*, § 50.

⁸ See *infra*, §§ 63-65.

⁹ *Dunnell v. Henderson*, 23 N. J. Eq. 174; *Sexton v. Lamb*, 27 Kan. 624; *Nichol v. Stewart*, 36 Ark. 612.

After the capital and contributions of the different partners have been fixed by agreement, they cannot be changed without the consent of all the partners. A partner cannot voluntarily increase his capital, nor can he be compelled to furnish more capital than he has agreed to bring in and risk. But he must bring in the amount he has agreed to do, and must leave it in the business until the firm is dissolved.¹⁰

Return of Contributions on Dissolution.

Upon the dissolution of the partnership, and the winding up of its affairs, the capital must be returned to the partners who contributed it, before there can be any distribution of profit.¹¹ Each partner's contribution is regarded as a firm debt to such partner, which must be repaid before there are any profits to be divided.¹² The capital is distributed in the same proportions in which it was furnished. A partner who furnished no capital, but merely contributed his time and services, is not entitled to any part of the capital.¹³ He must look to his share of the profits for compensation. Where the

¹⁰ Lindl. Partn. p. 321; Fulmer's Appeal, 90 Pa. 143; Crawshaw v. Collins, 15 Ves. 218; Cocke v. Evans' Heirs, 9 Yerg. (Tenn.) 287.

¹¹ Whitcomb v. Converse, 119 Mass. 38, Burdick's Cases, 575, Mechem's Cases, 492; Shea v. Donahue, 15 Lea (Tenn.) 160; Taylor v. Coffing, 18 Ill. 422; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525.

¹² Whitcomb v. Converse, 119 Mass. 38, Burdick's Cases, 575, Mechem's Cases, 492. Of course the debt of the firm to a partner for capital is subordinate to the claims of third persons. See *infra*, § 127.

¹³ Washington v. Washington (Tex. Civ. App.), 31 S. W. 88; Shea v. Donahue, 15 Lea (Tenn.) 160; Conroy v. Campbell, 13 Jones & S. (N. Y.) 326; Hasbrouck v. Childs, 3 Bosw. (N. Y.) 105. A simple method of making distribution in accordance with the rule stated in the text is to ascertain the amount contributed by each partner; and the amount contributed by one partner in excess of another should first be given him out of the assets, and then the balance is to be divided among all the partners in proportion to their several interests. The excess of one partner's advances over those of another constitute a preferred claim upon the partnership assets.

firm assets are not sufficient to return the capital in full to those who contributed, the deficiency must be borne by all the partners in the proportion in which they would be liable for any other loss, and, in the absence of anything to show a contrary agreement, it will be presumed that the loss is to be shared equally, even though the capital may have been contributed unequally.¹⁴ The loss does not fall solely upon the partners contributing the capital. A partner who contributed only his services is liable for his share of a loss of capital, though he also has lost his labor.¹⁵

Presumption of Equality.

Where there is nothing to show what proportion of the capital was contributed by each partner, it will be presumed, *prima facie*, that all contributed equally, and a distribution and settlement will be made on that basis.¹⁶

Chamberlain v. Sawyers, 17 Ky. L. R. 716, 32 S. W. 475; Matthews v. Adams (Md.), 33 Atl. 645; Nims v. Nims, 23 Fla. 69, 1 So. 527; Fish v. Thompson, 68 Vt. 273, 35 Atl. 174, Burdick's Cases, 3.

¹⁴ Whitcomb v. Converse, 119 Mass. 38, Burdick's Cases, 575, Mechem's Cases, 492; Jones v. Butler, 87 N. Y. 613; Taft v. Schwamb, 80 Ill. 289, Burdick's Cases, 577; Richards v. Grinnell, 63 Iowa, 44, 18 N. W. 668; Raymond v. Putnam, 44 N. H. 160; Peacock v. Peacock, 16 Ves. 49; Copland v. Toulmin, 7 Clark & F. 349; Robinson v. Anderson, 7 De Gex, M. & G. 239; Taylor v. Coffing, 18 Ill. 422. As to the amount of a partner's share of profits and losses, see *infra*, § 75.

In Hasbrouck v. Childs, 3 Bosw. (N. Y.) 105, each partner contributed the same amount of capital, but it was agreed that H., who was to devote his whole time to the business, should receive three-fourths of the profits. The firm met with a loss. It was held that the loss should be equally borne by all the partners, and that each was entitled to an equal share of the remaining assets.

¹⁵ Whitcomb v. Converse, 119 Mass. 38, Burdick's Cases, 575, Mechem's Cases, 492; Woelfel v. Thompson, 173 Mass. 301, 53 N. E. 819.

¹⁶ Jackson v. Crapp, 32 Ind. 429; Peacock v. Peacock, 16 Ves. 49; Copland v. Toulmin, 7 Clark & F. 349; Robinson v. Anderson, 7 De Gex, M. & G. 239.

CHAPTER VII.

PARTNERSHIP PROPERTY.

- 66-68. What Constitutes.
- 69-71. How Title is Held.
- 72-73. Nature of Partner's Interest.
- 74. Sale or Partition.
- 75-76. Proportionate Share of Each Partner.
- 77-78. Attachment or Execution for Individual Debt of Partner.
- 79-80. Conversion of Firm Realty into Personalty.
- 81. Changing Joint into Separate Property, and Vice Versa.

WHAT CONSTITUTES.

- 66. Partnership property includes everything of value which belongs to the partners as a firm, as distinguished from that which belongs to the partners as individuals.
- 67. Whether or not any particular property is partnership property depends upon the intention of the partners, as evidenced by their express or implied agreement.
- 68. Prima facie, all property and valuable interests originally brought into the capital stock, and the product thereof, constitutes partnership property, except—
Exception.—Where co-owners of land are partners merely as to the profits of the land, other land purchased out of such profits belongs to them as co-owners, and not as partners.

The expression "partnership property" denotes everything to which all the partners are entitled as partners.¹ Whether or not any particular property, real or personal, is or is not

¹ Persons may be entitled to property jointly or in common, and may also be partners, and yet that property may not be partnership property. *Morris v. Barrett*, 3 Younge & J. 384.

partnership property, depends upon the agreement between the partners,² and, in the absence of any express agreement, upon the agreement which may be implied from the circumstances under which it was acquired and subsequently used.³

² *Robinson Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078, *Burdick's Cases*, 165, *Mechem's Cases*, 155; *Lindsay v. Race*, 108 Mich. 28, 61 N. W. 271; *Fairchild v. Fairchild*, 64 N. Y. 477; *Lefevre's Appeal*, 69 Pa. 125; *Brooke v. Washington*, 8 Grat. (Va.) 248, 56 Am. Dec. 146.

³ Whether or not land is partnership property depends upon the intention of the partners. *Wilson v. Black*, 164 Pa. 555, 30 Atl. 488; *Robinson Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078, *Burdick's Cases*, 165, *Mechem's Cases*, 155, wherein the court said: "That intention may be expressed in the deed conveying the land, or in the articles of partnership, but when it is not so expressed, the circumstances, usually relied upon to determine the question, are the ownership of the funds paid for the land, the uses to which it is put, and the manner in which it is entered in the accounts upon the books of the firm. Where real estate is bought with partnership funds for partnership purposes, and is applied to partnership uses, or entered and carried in the accounts of the firm as a partnership asset, it is deemed to be firm property; and, in such case, it makes no difference, in a court of equity, whether the title is vested in all the partners as tenants in common, or in one of them, or in a stranger." See, also, *Lindsay v. Race*, 108 Mich. 28, 61 N. W. 271; *Page v. Thomas*, 43 Ohio St. 38, 1 N. E. 79; *Calkner v. Greig*, 137 Pa. 606, 26 Atl. 938.

"When the land is conveyed to several partners, it is not indispensable that it should be actually used for partnership purposes, nor that a positive agreement should be proved, making it partnership property. If it has been paid for with partnership effects, it is then a question of intention, whether the conveyance is to have its legal effect, and the parties are to be treated as tenants in common, or whether the land is to be treated as partnership property. The manner in which the accounts are kept, whether the purchase money was severally charged to the members of the firm, or whether the accounts treat it the same as other firm property, as to purchase money, income, expenses, etc., are controlling circumstances in determining such intention, and from these circumstances an agreement may be inferred." *Fairchild v. Fairchild*, 64 N. Y. 477. The same evidence which will establish its character as partnership property for the purpose of paying the debts and adjusting the

All property originally brought into the partnership stock, or subsequently acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, is partnership property.⁴ The capital is necessarily partnership property, for by its very nature it is property agreed to be contributed by the partner to the firm for partnership purposes.⁵ Property bought with money

equities will determine it for the purpose of final division. *Fairchild v. Fairchild*, 64 N. Y. 471.

⁴ *Smith v. Small*, 54 Barb. (N. Y.) 223; *Wheatley's Heirs v. Calhoun*, 12 Leigh (Va.) 264, 37 Am. Dec. 654. "Land is not ordinarily a subject of partnership operation, and therefore stronger evidence is required to show an intent to convert real estate into partnership stock. But it is capable of being so converted; and an intention to make such conversion being shown by sufficient evidence, it becomes as completely a part of the social effects as if it were personal estate. In the case of *Wheatley's Heirs v. Calhoun*, 12 Leigh (Va.) 264, 37 Am. Dec. 654, this court said that 'whatever doubts may have heretofore existed as to the light in which real property is to be considered, when bought and used by a commercial partnership for the purposes of the concern, it is now well settled that it is to be looked upon as forming a part of the partnership funds. Such is at present the received doctrine in England, and so this court has decided.' In that case, *Wheatley and Calhoun* had purchased a mill and tract of land jointly, and for some time conducted a partnership milling business. The question was whether there was sufficient evidence of an intention to convert the mill into partnership stock, or whether they merely intended to carry on the milling business in partnership. *Tucker, P.*, in delivering the opinion of the court, said: "There may, indeed, be partnerships in the business of milling, or mining, or farming; but unless the intent of the joint owners to throw their real estate into the fund as partnership stock is distinctly manifested, or unless the real property is bought out of the social funds, for partnership purposes, it must still retain its character of realty." "In this case, I see nothing from whence to infer that there was any design on the part of these joint purchasers to convert their real estate into partnership stock." *Brooke v. Washington*, 8 Grat. (Va.) 248, 56 Am. Dec. 146.

Seated on stock exchange, *In re Snift*, 118 Fed. 348.

⁵ See *supra*, c. 6, "Capital."

belonging to the firm is *prima facie* partnership property,⁶ even though the title is taken in the individual name of one or more partners.⁷ Property may, however, be purchased with partnership funds, to be held by the partners as individuals, if such is their intention.⁸ Such a transaction would amount merely to a withdrawal by mutual agreement of so much capital or profits from the firm business. The good

⁶ *Scott v. McKinney*, 98 Mass. 344; *Cundey v. Hall*, 208 Pa. 335; *Foster v. Sargent*, 72 N. H. 170, 55 Atl. 423; *Dawson v. Parsons*, 10 Misc. Rep. (N. Y.) 428; *Thursby v. Lidgerwood*, 69 N. Y. 198; *Smith v. Smith*, 5 Ves. Jr. 193; *Ex parte Hinds*, 3 De Gex & S., 613. Land bought or improved by partnership funds is treated as partnership property between the parties. *Meason v. Kaine*, 63 Pa. 335. Real estate purchased with partnership funds for the use of the firm, although the legal title is in the member or members of the firm in whose name the conveyance is taken, is in equity considered as the property of the firm, for the payment of its debts, and for the purpose of adjusting the equitable claims of the copartners as between themselves. *Smith v. Tarlton*, 2 Barb. Ch. (N. Y.) 336.

⁷ *Traphagen v. Burt*, 67 N. Y. 30; *Williams v. Gillies*, 75 N. Y. 197, *Burdick's Cases*, 290; *Davis v. Davis*, 60 Miss. 615, *Burdick's Cases*, 164; *Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 679, *Burdick's Cases*, 167; *Smith v. Smith*, 5 Ves. 193. A trust results in favor of the other partner to the extent of his interest in the funds. *Crone v. Crone*, 180 Ill. 599, 54 N. E. 605.

⁸ *Dyer v. Clark*, 5 Metc. (Mass.) 562, *Ames' Cas.* 251, wherein the court said that this would be the case "where there is such an express agreement at the time of the purchase, or a provision in the articles of copartnership, or where the price of such purchase should be charged to the partners respectively in their several accounts with the firm. This would operate as a division and distribution of so much of the funds, and each would take his share divested of any implied trust." If, with the acquiescence of the members of a firm, partnership funds are applied to the purchase of real estate in the name of one member, there is no resulting trust. *Lefevre's Appeal*, 69 Pa. 122.

"Land purchased by a partner with money drawn from the firm and charged to his individual account cannot be regarded as partnership property, never having been appropriated to partnership purposes." *Louisville Trust Co. v. Columbia Finance & Trust Co.*, 22 Ky. Law Rep. 1385, 59 S. W. 867, 60 S. W. 1.

will of the partnership business, in so far as it has a salable value, is *prima facie* partnership property.⁹

Property may be used for partnership purposes, and yet, by agreement, remain the individual property of one of the partners,¹⁰ as is not infrequently the case with respect to office furniture, trade utensils, and the like;¹¹ for, as has been seen, the mere use of property, and not the property itself, may be contributed as capital.¹² But if the property itself is brought into the capital stock as part of such partner's contribution to the joint capital, it becomes partnership property, and any increase in its value will belong to the firm, and any decrease must be borne by the firm.¹³

The most difficult cases are those in which co-owners are partners in profits derived from the common property. If the property is acquired for the purpose of being worked in partnership, or is merely accessory to and involved in the partnership trade, it will be deemed partnership property; otherwise, not.¹⁴ Where several persons are co-owners of

⁹ Wedderburn v. Wedderburn, 23 Beav. 104; Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 96 Am. St. Rep. 605, 61 L. R. A. 796.

¹⁰ Pearce v. Pearce, 77 Ill. 284; Flagg v. Stowe, 85 Ill. 164; Champion v. Bostwick, 18 Wend. (N. Y.) 175; Van Voorhis v. Webster, 85 Hun, 591, 33 N. Y. Supp. 121; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014; Burdon v. Barkus, 4 De Gex, F. & J. 42; Hart v. Hart, 117 Wis. 639, 94 N. W. 890.

¹¹ Ex parte Owen, 4 De Gex & S. 351; Ex parte Smith, 3 Maddocks, 63.

¹² See supra, c. 6, "Capital." Where it was agreed that a commission company should provide the free use of an elevator to defendant, and pay the taxes thereon, and that defendant should furnish a certain amount of capital, and should buy grain and ship it to the commission company, and that the profits should be divided, it was held that the company contributed merely the use of the elevator, and not the elevator itself, to the enterprise. Murphy v. Warren, 55 Neb. 215, 75 N. W. 573.

¹³ Robinson v. Ashton, L. R. 20 Eq. 25.

¹⁴ Robinson Bank v. Miller, 153 Ill. 244, 33 N. E. 1073, Burdick's Cases, 165, Mechem's Cases, 155; Crawshaw v. Maule, 1 Swanst. 495;

land, and are partners merely as to the profits made by the use of the land, and not as to the land itself, other land purchased by them out of the profits, to be used in like manner, will, in the absence of an agreement to the contrary, belong to them as co-owners, and not as partners.¹⁵ The acquired land may, however, be partnership property, though the original property is not, if such is the intention of the parties¹⁶

HOW TITLE IS HELD.

69. Partnership personalty may be acquired, held, and transferred, either in the firm name, or in the individual name of one or more of the partners.
70. The legal title to partnership realty cannot be held in the firm name, but must be held in the individual name of one or more of the partners, or by a trustee.
71. It is immaterial in whose name the title to either realty or personalty is taken, as the property will be deemed partnership property, and the holder a trustee for the firm.

Personalty.

A firm, as such, may acquire, hold, and transfer personal property and contract in reference thereto in its firm name.¹⁷ So, also, personalty may be acquired by one or more partners

Fereday v. Wightwick, Tamlyn, 250; *Waterer v. Waterer*, L. R. 15 Eq. 402; *Jackson v. Jackson*, 9 Ves. Jr. 591; *Davies v. Games*, 12 Ch. Div. 813; *Brown v. Oakshot*, 24 Beav. 254; *Davis v. Davis* (1894), 1 Ch. 393, *Burdick's Cases*, 12. A theater building and its appurtenances owned by partners are partnership property, where the partnership business consists in the uses to be made thereof. *Priest v. Chouteau*, 12 Mo. App. 252, affirmed 85 Mo. 393.

¹⁵ *Steward v. Blakeway*, L. R. 4 Ch. App. 608, L. R. 6 Eq. 470.

¹⁶ *Morris v. Barrett*, 3 Younge & J. 384.

¹⁷ See ante, c. 5, "Firm Name."

in their own name, but which will nevertheless belong to the firm, as where such was the understanding of all the partners, or where it was purchased out of partnership funds.¹⁸ However the title may be acquired, the whole legal and beneficial ownership of partnership chattels is in the firm as such, and not in the partners as individuals.¹⁹

Realty.

The principle of law is well settled that it is impossible for a partnership, as such, to hold the legal title to real estate.²⁰ Only a person can hold the legal title to real estate, and, as has been seen, a partnership is not a legal person.²¹ Where a deed is made to a partnership in its firm name, and such firm name contains the individual names of one or more of the partners, the legal title will vest in such of the partners as are named in the firm name, and therefore in the deed, and in them only.²² But the legal title so vested in one or more

¹⁸ *Wolf v. Selling* (Super. Ct. N. Y.), 25 N. Y. Supp. 963

¹⁹ *Hendren v. Wing*, 60 Ark. 561, 31 S. W. 149, *Burdick's Cases*, 161.

²⁰ *Percifull v. Platt*, 36 Ark. 456; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Kelley v. Bourne*, 15 Or. 476, 16 Pac. 40; *Holmes v. Jarrett*, 7 Helsk. (Tenn.) 506, *Ames' Cas.* 150. Though a partnership, as such, possesses no capacity to take a conveyance of the legal title to real estate, it may acquire in its firm name a lien on real estate to secure an indebtedness. *Barber v. Crowell*, 55 Neb. 571, 75 N. W. 1109.

²¹ *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497; *Gille v. Hunt*, 35 Minn. 357, 29 N. W. 2; *Holmes v. Jarrett*, 7 Helsk. (Tenn.) 506, *Ames' Cas.* 150.

²² *Gossett v. Kent*, 19 Ark. 602; *Winter v. Stock*, 29 Cal. 407; *Woodward v. McAdam*, 101 Cal. 438, 35 Pac. 1016, *Burdick's Cases*, 163; *Menage v. Burke*, 43 Minn. 211, 45 N. W. 155; *Moreau v. Safarans*, 3 Sneed (Tenn.) 595; *Holmes v. Jarrett*, 7 Helsk. (Tenn.) 506, *Ames' Cas.* 150; *Riddle v. Whitehill*, 135 U. S. 621. The mere fact that the given or Christian names of the partners do not appear does not render the deed void for uncertainty as to the grantees, but parol evidence is admissible to show who were intended to

individual members of the firm is held by them as trustees for the partnership.²³ In the view of equity, it is immaterial in whose name the legal title of the property stands,—whether in the individual name of a copartner, or in the joint names of all. The possessor of the legal title holds the property in trust for the purposes of the partnership,²⁴ and the property is deemed partnership property, and is subject to all the incidents thereof.²⁵

be grantees. *Holmes v. Jarrett*, 7 Heisk. (Tenn.) 506, Ames' Cas. 150; *Ward v. Espy*, 6 Humph. (Tenn.) 447. Where the firm name does not contain the name of any individual partner, the title remains in the grantor, but in trust for the firm. *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497.

It has been held in a few jurisdictions that a conveyance to a firm, in which the grantee is designated by its firm name, conveys the legal title to the property to those who use that "style and firm." *Brunson v. Morgan*, 76 Ala. 593; *Hoffman v. Porter*, 2 Brock. 158, Fed. Cas. No. 6,577; *Jones v. Neale*, 2 Pat. & H. (Va.) 339; *Maugham v. Sharpe*, 17 C. B. (N. S.) 443, *Burdick's Cases*, 160. Mr. Burdick (Partn. p. 81) approves of this view, upon the ground that it is unnecessary to designate the grantee by name if he is otherwise sufficiently described, and a firm name is a sufficient description because "id certum est quod certum reddi potest."

²³ *Holmes v. Jarrett*, 7 Heisk. (Tenn.) 506, Ames' Cas. 150; *Moreau v. Saffarans*, 3 Sneed (Tenn.) 599. Such a resulting trust may be established by parol. *Kringle v. Rhomberg*, 120 Iowa, 472, 94 N. W. 1115.

²⁴ *Gray v. Palmer*, 9 Cal. 616; *Dupuy v. Leavenworth*, 17 Cal. 262; *Faulds v. Yates*, 57 Ill. 416; *Railsback v. Lovejoy*, 116 Ill. 442, 6 N. E. 504; *Bopp v. Fox*, 63 Ill. 540; *Pepper v. Pepper*, 24 Ill. App. 316; *Allison v. Perry*, 130 Ill. 9, 22 N. E. 492; *Paige v. Paige*, 71 Iowa, 318, 32 N. W. 360, *Mechem's Cases*, 170; *Harris v. Harris*, 153 Mass. 439, 26 N. E. 1117; *Dyer v. Clark*, 5 Metc. (Mass.) 562, Ames' Cas. 251; *Delmonico v. Guillaume*, 2 Sandf. Ch. (N. Y.) 366, *Burdick's Cases*, 161; *Williams v. Gillies*, 75 N. Y. 197, *Burdick's Cases*, 290; *Riddle v. Whitehill*, 135 U. S. 621; *Shanks v. Klein*, 104 U. S. 18, *Mechem's Cases*, 164, *Paige's Cas.* 136.

²⁵ *Jones v. Davies*, 60 Kan. 309; *Spalding v. Wilson*, 80 Ky. 583. *Dyer v. Clark*, 5 Metc. (Mass.) 562; *Messer v. Messer*, 59 N. H. 375; *Ross v. Henderson*, 77 N. C. 170; *Riddle v. Whitehill*, 135 U. S. 321; *Crawshay v. Maule*, 1 Swanst. 530, 19 Eng. Rul. Cas. 484. *Land*

A *bona fide* purchaser for value, and without notice from the partner who holds the legal title, takes the title discharged of any trust in favor of the firm or its creditors.²⁶ But if such purchaser had notice that the property was in fact partnership property, or if, being without notice, he did not part with value upon the faith of the apparent title in his grantor, he takes the title subject to the trust or charge in favor of the firm and its creditors.²⁷

may belong to a partnership, although held in the name of one partner. *Williams v. Sheldon*, 61 Mich. 311, 28 N. W. 115. It is immaterial in whom the legal estate is vested,—whether in one of the partners or in all. It is equally partnership property, and a court of equity will deal with it as such. *Darby v. Darby*, 8 Drewry, 495, *Ames' Cas.* 177. Where land is purchased with joint funds, and for partnership purposes, it becomes firm property, though the title be held by one of the partners in his own name; and judgments against the firm are payable out of the proceeds thereof, in preference to individual judgments. *Erwin's Appeal*, 39 Pa. 535; *West Hickory Min. Ass'n v. Reed*, 80 Pa. 38. And see *Black v. Seipt*, 34 Leg. Int. (Pa.) 66. Real estate put into the partnership by one of the parties at an agreed valuation becomes partnership property without a conveyance from the owner, and such owner holds the legal title in trust for the partnership as assets of the partnership estate. *Wiegand v. Copeland*, 14 Fed. 118.

²⁶ *McNeill v. First Congregational Soc.*, 66 Cal. 105, 4 Pac. 1096; *Robinson Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078, *Burdick's Cases*, 165, *Mechem's Cases*, 155; *McMillan v. Hadley*, 78 Ind. 590; *Hiscock v. Phelps*, 49 N. Y. 97.

²⁷ *Goldthwait v. Janney*, 102 Ala. 431, 15 So. 560, *Burdick's Cases*, 176; *Dyer v. Clark*, 5 Metc. (Mass.) 562, *Ames' Cas.* 251; *Mattlack v. James*, 13 N. J. Eq. 126; *Page v. Thomas*, 43 Ohio St. 38, 1 N. E. 79. It is a legal presumption that a firm's possession of realty is subordinate to, and consistent with, the record title in an individual member. *Hardin v. Dolge*, 46 App. Div. 416, 61 N. Y. Supp. 753. There may be a dormant partnership in the purchase and sale of real estate as between the partners themselves, but, as between the partners and third persons, the law in regard to dormant partners will not apply. *Gray v. Palmer*, 9 Cal. 616.

Where there is a conveyance of firm land, by consent, to one of the partners, and the deed is recorded, but is accompanied by no agreement disclosing the interest of the other, and money is bor-

The best method of conveying real estate to a firm is to name all the partners in the deed as grantees, describing them as doing business as partners under a designated firm name, and expressly declaring that the grantees are to hold the title as such partners, and for partnership purposes. Where this is done, no question can arise as to whether the property is partnership or individual property, and no subsequent purchaser can claim to have purchased without knowledge of its partnership character.²⁸

NATURE OF PARTNER'S INTEREST.

72. The interest of partners in partnership property is neither that of tenants in common nor joint tenants, but is *sui generis*.
73. The share of a partner at any given time is the proportion of the then existing assets to which he would be entitled after the discharge of all the then existing debts.

The interest of partners in the partnership property is a peculiar one. The recognized incidents attaching to such property differ in so many respects from those attaching to other forms of collective holding recognized in the law that it is misleading to attempt to assimilate a holding in partnership to any of them. An estate in partnership has many of

rowed by the grantee in the deed on his personal judgment bill, which is entered of record against the land as he then held it, no averment of any right by parol, or by secret agreement in writing, can stamp the land as firm property, and thus destroy the lien of the judgment creditor. *Gunnison v. Erie Dime Sav. & Loan Co.*, 157 Pa. 303, 27 Atl. 747, 33 W. N. C. (Pa.) 303. See, also, *J. Para. Partn.* § 111, and compare *Page v. Thomas*, 43 Ohio St. 38, 1 N. E. 79.

²⁸ *Mechem, Partn.* § 104; *Lauffer v. Cavett*, 87 Pa. 479; *Davis v. Davis*, 60 Miss. 615, *Burdick's Cases*, 164.

the characteristics of estates in common and in joint tenancy, but partners are neither tenants in common nor joint tenants.²⁹ If partners were tenants in common, a sale or transfer of one partner's interest in the firm property would vest in the transferee an undivided interest in such property; but it is well settled that a partner cannot so transfer an undivided interest in any specific article belonging to the firm;³⁰ and a transfer of his interest, either by voluntary act or by legal process, merely entitles the transferee to receive such partner's share of what may remain after a settlement of the partnership affairs, and the payment of all the partnership debts.³¹ On the other hand, a partner may sell specific partnership property so as to pass the entire title to the vendee; whereas, if a tenant in common should attempt to sell the entire common property, only his own undivided interest would pass.³² So, also, upon the death of a partner, the firm assets

²⁹ *Hubbardston Lumber Co. v. Covert*, 35 Mich. 254; *Hutchinson v. Dubois*, 45 Mich. 143, 7 N. W. 714; *Kramer v. Arthurs*, 7 Pa. 165; *Preston v. Fitch*, 137 N. Y. 41, 33 N. E. 77; *Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 679, *Burdick's Cases*, 167.

³⁰ *Nichol v. Stewart*, 36 Ark. 612; *Pratt v. McGuinness*, 173 Mass. 170, 53 N. E. 380.

³¹ *Sanborn v. Royce*, 132 Mass. 594; *Collins' Appeal*, 107 Pa. 590; *Durborrow's Appeal*, 84 Pa. 404; *Kenneweg v. Schillansky*, 45 W. Va. 521, 31 S. E. 949; *Bank v. Carrollton R. Co.*, 11 Wall. (U. S.) 624, *Mechem's Cases*, 147; *Ex parte Ruffin*, 6 Ves. 119, *Burdick's Cases*, 192, 19 Eng. Rul. Cas. 628; *West v. Skip*, 1 Ves. Ser. 240, 19 Eng. Rul. Cas. 621. An assignee, therefore, or separate creditor, of one partner, is entitled only to the share of each partner, after a settlement of the accounts, and after all the just claims of the other partner are satisfied. *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522. The transferee does not become a tenant in common with the other partners. *Bank v. Carrollton R. Co.*, 11 Wall. (U. S.) 624, *Mechem's Cases*, 147; *Donaldson v. State Bank*, 1 Dev. Eq. (N. C.) 103.

³² *Shearer v. Shearer*, 98 Mass. 107, *Ames' Cas.* 185; *Person v. Wilson*, 25 Minn. 189; *Mersereau v. Norton*, 15 Johns. (N. Y.) 180; *Thursby v. Lidgerwood*, 69 N. Y. 198; *Thompson v. Bowman*, 6 Wall. (U. S.) 316.

vest in the survivors, to the exclusion of the deceased partner's representatives;³³ and in this respect, an estate in partnership approximates a joint tenancy, rather than a tenancy in common, but that it is not a joint tenancy is apparent from the fact that this right of survivorship is not a beneficial right. The survivor takes the assets charged with a trust, or *quasi* trust,³⁴ to pay the firm debts, and wind up its

³³ *Smith v. Wood*, 31 Md. 293; *Dyer v. Clark*, 5 Metc. (Mass.) 562, Ames' Cas. 251; *Holbrook v. Lackey*, 13 Metc. (Mass.) 132, Ames' Cas. 160; *Bush v. Clark*, 127 Mass. 111; *Bassett v. Miller*, 39 Mich. 133, Ames' Cas. 162; *Merritt v. Dickey*, 38 Mich. 41; *Barry v. Briggs*, 22 Mich. 201; *Shanks v. Klein*, 104 U. S. 18, Mechem's Cases, 164; *Clay v. Freeman*, 118 U. S. 97; *Newell v. Townsend*, 6 Sim. 419, Ames' Cas. 154; *Martin v. Crump*, 2 Salk. 444, 1 Ld. Raym. 340, Ames' Cas. 153; *Rees v. Duncan*, 21 Australian Law Times, 205 (Victoria). But see *Buckley v. Barber*, Exch. 164, Ames' Cas. 154. See, also, *infra*, c. 11, "Dissolution." An execution cannot be levied upon partnership goods for the individual debt of a partner, after the death of such partner, because the property in the goods thereupon vests in the survivor. *Newell v. Townsend*, 6 Sim. 419, Ames' Cas. 154. The whole property in the partnership estate accrues to the surviving partner, and he is the owner thereof, both at common law and in equity. *Knox v. Gye*, L. R. 5 H. L. Cas. 656, Ames' Cas. 163. The time of dissolution fixes the time at which the account is to be taken in order to ascertain the amount of a partner's share. However long it may be before a final settlement may be had, when made, it must relate back to the time of dissolution to determine the relative interests of the partners in the fund. *Dyer v. Clark*, 5 Metc. (Mass.) 562, Ames' Cas. 251. The surviving partner must sue alone upon choses in action belonging to the firm, and the personal representatives of the deceased partner cannot be joined. *Bassett v. Miller*, 39 Mich. 133, Ames' Cas. 162; *Willson v. Nicholson*, 61 Ind. 241; *Daby v. Ericsson*, 45 N. Y. 786; *Stafford v. Gold*, 9 Pick. (Mass.) 533. See, also, *infra*, chap. 10, "Actions." The surviving partner is the real party in interest to a demand owned by or due to the firm. *Daby v. Ericsson*, 45 N. Y. 786.

³⁴ *Hill v. Draper*, 54 Ark. 395, 15 S. W. 1025; *Jones v. Dexter*, 130 Mass. 380; *Russell v. McCall*, 141 N. Y. 437, 39 N. E. 498, *Burdick's Cases*, 256; *Knox v. Gye*, L. R. 5 H. L. Cas. 656. "The surviving partner is often called a 'trustee,' but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the

affairs, and he must account to the representatives of his deceased partner for all the firm assets.³⁵

death of a partner, the law confers on his representatives certain rights as against the surviving partner, and imposes upon the latter correspondent obligations. The surviving partner may be called, so far as these obligations extend, a trustee for the deceased partner; but when these obligations have been fulfilled, or are discharged, or terminate by law, the supposed trust is at an end. * * * The surviving partner may be called a trustee for the dead man, but the trust is limited to the discharge of the obligation, which is liable to be barred by lapse of time,—as between an express trustee and the cestui que trust time will not run; but the surviving partner is not a trustee, in that full and proper sense of the word. It is most necessary to mark this again and again, for there is not a more fruitful source of error in law than the inaccurate use of language. * * * The mistaken phrase that a surviving partner is a trustee, and that therefore no time can run as between him and the representative of the deceased partner, has led to what I humbly conceive to be the error in the judgment originally given." *Knox v. Gye*, L. R. 5 H. L. Cas. 656, Ames' Cas. 163.

In *Taylor v. Taylor*, 28 Law Times (N. S.) 189, Ames' Cas. 172, note, James, L. J., said: "The law is that the right of a surviving partner to the partnership assets is absolute. The right of the legal personal representatives of the deceased partner is to an account merely of the partnership assets; and to the taking of that, as to the taking of any other account, the statute of limitations applies. The case of *Knox v. Gye* was strongly approved.

³⁵ *Dyer v. Clark*, 5 Metc. (Mass.) 562, Ames' Cas. 251; *Holbrook v. Lackey*, 13 Metc. (Mass.) 132, Ames' Cas. 160; *Strauss v. Frederick*, 91 N. C. 121; *Rees v. Duncan*, 21 Australian Law Times, 205 (Victoria); *West v. Skip*, 1 Ves. Sr. p. 242, 19 Eng. Rul. Cas. 622; *Jeffereys v. Small*, 1 Vern. 217. Ames' Cas. 152; *Lake v. Gibson*, 1 Eq. Cas. Abr. 290, pl. 3; *Martin v. Crump*, 2 Salk. 444, 1 Ld. Raym. 340, Ames' Cas. 153. It is not necessary to provide against survivorship in the partnership articles. *Jeffereys v. Small*, 1 Vern. 217, Ames' Cas. 152. The right of the deceased partner's representative consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance which accrues to the deceased's share and interest in the partnership. *Knox v. Gye*, L. R. 5 H. L. Cas. 656, Ames' Cas. 163. The good-will in a partnership business does not, on the death of one partner, survive beneficially to the others. When it has any value,

The real and actual interest of each partner in the partnership stock is the net balance which will be coming to him after payment of all the partnership debts, and a just settlement of the account between himself and his partners.³⁶

As has been seen, the legal title to real estate cannot be held by the firm, as such.^{36a} Where the legal title to realty is vested in more than one partner, it is held by them as tenants in common,³⁷ but in equity it is chargeable with the partnership debts, and with any balance which may be due from one partner to another upon winding up the affairs of

a due proportion belongs to the estate of the deceased partner, but the surviving partner has still the right to carry on the same business, and at the same place. *Smith v. Everett*, 27 Beav. 446, 29 L. J. Ch. 236, 19 Eng. Rul. Cas. 649.

³⁶ *Noonan v. Nunan*, 76 Cal. 44, 18 Pac. 98; *Filley v. Phelps*, 18 Conn. 294; *Carter v. Bradley*, 58 Ill. 101; *Bopp v. Fox*, 63 Ill. 540; *Sindelare v. Walker*, 137 Ill. 43, 27 N. E. 59, *Burdick's Cases*, 304, *Mechem's Cases*, 154; *Tobey v. McFarlin*, 115 Mass. 98; *Dyer v. Clark*, 5 Metc. (Mass.) 562, *Ames' Cas.* 251; *Hutchinson v. Dubois*, 45 Mich. 143, 7 N. W. 714; *Staats v. Bristow*, 73 N. Y. 264, *Mechem's Cases*, 152, *Paige, Cas.* 106; *Menagh v. Whitwell*, 52 N. Y. 146, *Burdick's Cases*, 222, *Ames' Cas.* 229; *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522; *Ludlow's Heirs v. Cooper's Devisees*, 4 Ohio St. 10; *Kenneweg v. Schilansky*, 45 W. Va. 521, 31 S. E. 949; *Bank v. Carrollton R. Co.*, 11 Wall. (U. S.) 624, *Mechem's Cases*, 147; *Case v. Beauregard*, 99 U. S. 119, *Mechem's Cases*, 440; *West v. Skip*, 1 Ves. Sr. 241, 19 Eng. Rul. Cas. 621; *Ex parte Ruffin*, 6 Ves. 119, *Burdick's Cases*, 192, 19 Eng. Rul. Cas. 628. A partner's interest is a chose in action, i. e., a jus in personam, and his claim is accordingly barred by the statute of limitations applicable to personal actions. *Knox v. Gye*, L. R. 5 H. L. Cas. 656, *Ames' Cas.* 163.

^{36a} See § 56, ante.

³⁷ *Pepper v. Pepper*, 24 Ill. App. 316; *Thayer v. Lane*, Walk (Mich.) 200; *Fountain v. Hutchinson*, 108 Mich. 596, 66 N. W. 477, *Coles v. Coles*, 15 Johns. (N. Y.) 159; *Greene v. Graham*, 5 Ohio, 264; *Alabama Marble & Stone Co. v. Chattanooga Marble & Stone Co. (Tenn. Ch.)*, 37 S. W. 1004. The legal title is in the partners as tenants in common and the equitable title is in the firm. *Hartnett v. Stillwell*, 121 Ga. 386, 49 S. E. 276.

the firm.³⁸ Upon the death of a partner in whom the legal title to real estate is vested, the legal title descends to his heirs, and does not pass to the surviving partners, as in the case of personalty. But the equitable title or beneficial interest does pass to the survivors for the purpose of settling up the partnership, and the heirs will hold the legal title in trust for that purpose.³⁹ It follows therefore, that a partner's real beneficial interest in firm realty stands upon the same footing with his interest in the personalty. In either case, it is simply a right to share in what may remain after winding up the partnership, and paying all its debts.⁴⁰

³⁸ *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165; *Smith v. Tarlton*, 2 Barb. Ch. (N. Y.) 336; *Buckley v. Buckley*, 11 Barb. (N. Y.) 43. Compare *Coster v. Clarke*, 3 Edw. Ch. (N. Y.) 428.

³⁹ *Tillinghast v. Champlin*, 4 R. I. 173; *Shanks v. Klein*, 104 U. S. 18, *Mechem's Cases*, 164; *Walling v. Burgess*, 122 Ind. 299; *Van Aken v. Clark*, 82 Iowa, 256, 48 N. W. 73; *Delmonico v. Guillaume*, 2 Sandf. Ch. (N. Y.) 366, *Burdick's Cases*, 161. The surviving partner takes real estate only so far as in equity it has the character of personalty, and this is so far, and so far only, as may be necessary for the payment of the partnership debts. *Strong v. Lord*, 107 Ill. 25.

Real estate purchased and held by a partnership firm for the purposes of the firm so far partakes of the character of personalty that it is under the control of a court of equity in making a final adjustment of the affairs of the partnership, whether in stating an account between the partners or in marshalling the assets for the payment of debts. The realty being impressed with this character, as assets of the firm, a court of equity has the power to vest in a surviving partner the discretion to dispose of it at public or private sale. *Mauck v. Mauck*, 54 Ill. 281.

⁴⁰ *Bopp v. Fox*, 63 Ill. 540; *Simpson v. Leech*, 86 Ill. 286; *Trowbridge v. Cross*, 117 Ill. 109, 7 N. E. 347; *Henry v. Anderson*, 77 Ind. 361; *Du Bree v. Albert*, 100 Pa. 483; *Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 679, *Burdick's Cases*, 167. A sale of partnership real estate by order of the orphan's court, for the payment of a deceased partner's debts, does not pass the interest of the firm, though the legal title was in the decedent alone. *McCormick's Appeal*, 57 Pa. 54. See *Jones' Appeal*, 70 Pa. 169. Compare *Rees v. Duncan*, 21 Australian Law Times, 205 (Victoria).

SAME—SALE OR PARTITION.

74. A partner is entitled to insist upon a sale, but not a partition, of partnership property.

Upon the dissolution of a partnership, all the property belonging to the partnership must be sold, and the proceeds, after discharging all the partnership debts and liabilities, must be divided among the partners according to their respective shares in the capital.⁴¹ No one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his share of it in specie.⁴² In other words, a partner can compel a sale, but not a partition of the partnership property.⁴³

In regard to personal property, the rule that it is to be in all cases converted into money for distribution is undoubtedly well established and entirely uniform everywhere. In this, equity follows the analogies of the law.⁴⁴

In regard to real estate, there is some conflict of decision. In some cases it is held that, so long as the debts of the partnership remain unliquidated, a partition will not be decreed, and that the only method by which a partner, under such conditions, can compel a division of the firm property, is by a bill to administer and settle the partnership affairs.⁴⁵ But

⁴¹ *Darby v. Darby*, 3 Drewry, 495, Ames' Cas. 177.

⁴² *Darby v. Darby*, 3 Drewry, 495, Ames' Cas. 177, citing *Crawshay v. Collins*, 15 Ves. 218, and *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

⁴³ *Lyman v. Lyman*, 2 Paine, 11, Fed. Cas. No. 8,628; *Sigourney v. Munn*, 7 Conn. 11; *Pierce's Adm'r v. Trigg's Heirs*, 10 Leigh (Va.) 406; *Wild v. Milne*, 26 Beav. 504, *Burdick's Cases*, 166, Ames' Cas. 173.

⁴⁴ *Shearer v. Shearer*, 98 Mass. 107, Ames' Cas. 185.

⁴⁵ *Molineaux v. Reynolds*, 54 N. J. Eq. 559, 35 Atl. 536, *Burdick's Cases*, 169. Lands purchased by a partnership for development and

where there are no unpaid debts of the firm outstanding, it is held that a partner may have a partition in kind,⁴⁶ and where a sale would work injustice a partner may pay all outstanding debts and insist on such a partition.^{46a} In other cases it is held, and this is the settled English view, that, upon the dissolution or termination of a partnership, any one of the partners is entitled to have the whole of the assets disposed of by sale, irrespective of whether there are any debts to be provided for or not, and that a partner cannot claim a partition of the property under any circumstances.⁴⁷

To prevent a sale of the partnership effects, it is frequently provided in the articles of copartnership that, upon a dissolution of the partnership by the death, notice, mis-

sale are not subject to partition among the partners at the request of one of the number, if such partition would hinder the venture, until the object of the partnership has been attained, or proved impracticable. *Craighead v. Pike* (N. J. Ch.), 38 Atl. 296. Land purchased with partnership funds, and title taken to partners. One dies. Held, that the land was held as tenants in common, and the part of the deceased descended to his heirs, and, being sold under order of court, purchaser is entitled to partition. *Greene v. Graham*, 5 Ohio, 264. Cited in *Ludlow's Heirs v. Cooper's Devisees*, 4 Ohio St. 8.

⁴⁶ *Mollineux v. Reynolds*, 54 N. J. Eq. 559, 35 Atl. 536, *Burdick's Cases*, 169. Real property which constitutes the stock in trade of a partnership that has no outstanding debts or liabilities may, upon the application of part of the firm, be divided among the partners according to their respective interests therein. *Patterson v. Blake*, 12 Ind. 436. Equity cannot be invoked to convert all real estate into personalty for the mere purpose of a division in the interest of one class of representatives of a deceased partner against another class of representatives of the same partner. *Shearer v. Shearer*, 98 Mass. 107, *Ames' Cas.* 185.

^{46a} *Kelley v. Shay*, 206 Pa. 208, 55 Atl. 925.

⁴⁷ *Wild v. Milne*, 26 Beav. 504, *Ames' Cas.* 173, *Burdick's Cases*, 166, citing *Crawshay v. Maule*, 1 Swanst. 518; *Cook v. Collingridge*, Jac. 607, 27 Beav. 456, 19 Eng. Rul. Cas. 634; *Featherstonhaugh v. Fenwick*, 17 Ves. 298, 19 Eng. Rul. Cas. 570. The executors of the deceased partner have a right to insist on a sale of every portion

conduct, or bankruptcy of one partner, the others shall be entitled to take his share at a valuation in a manner prescribed.⁴⁸

PROPORTIONATE SHARE OF EACH PARTNER.

75. The relative shares to which each partner is entitled in the partnership property is regulated by their agreement.
76. In the absence of proof of a different agreement, the shares of all the partners will be presumed to be equal.

The rules as to the distribution and return of capital upon the dissolution of a firm have been already considered.⁴⁹ Whatever remains after the return of the capital constitutes profits, and is to be shared by the partners in accordance with the agreement therefor in the articles of partnership.⁵⁰

of the partnership property. *Knox v. Gye*, L. R. 5 H. L. Cas. 656, Ames' Cas. 163, per Lord Chancellor. Compare *Shearer v. Shearer*, 98 Mass. 107, Ames' Cas. 185.

⁴⁸ *Wilson v. Greenwood*, 1 Swanst. 471; *Burfield v. Rouch*, 31 Beav. 241; *Homfray v. Fothergill*, L. R. 1 Eq. 567. See, also, *Cook v. Collingridge*, Jac. 607, 19 Eng. Rul. Cas. 634. "Where the articles do not prescribe the terms, the law ascertains what shall be the consequence of dissolution, viz., that the whole of the joint property must be sold off, and the whole concern wound up." *Featherstonhaugh v. Fenwick*, 17 Ves. 308, 19 Eng. Rul. Cas. 578.

⁴⁹ See ante, c. 6, "Capital." The doctrine under consideration "must be kept distinct from divisions of capital and repayment of capital on winding up. It relates only to dividing profit and loss, but does not alter the treatment of capital, as, if a debt, to be first paid before profits are divided, and, in case of impairment, to be repaid, less the equalization of losses." *Bates, Partn.* § 181.

⁵⁰ *Taft v. Schwamb*, 80 Ill. 289, *Burdick's Cases*, 577; *Taylor v. Coffing*, 18 Ill. 422. Of course there is nothing to prevent the parties from making such an agreement as they choose with regard to the sharing of profit and loss. *Paul v. Cullum*, 132 U. S. 539; *Welsh v. Canfield*, 60 Md. 469; *Fleischmann v. Gottschalk*, 70 Md. 523, 17

In the absence of any proof as to what the agreement of the partners was upon this point, it will be presumed that the profits and losses were to be divided equally.⁵¹ This presumption of equality prevails, whether the partners have contributed to the capital equally or unequally, whether they are or are not on a par as regards skill, connection, or character, and whether they have or have not labored equally for the

Atl. 384. If there is an agreement as to the proportion in which profits are to be shared, it will be presumed that losses are to be borne in the same ratio, though there is no positive rule to that effect. *Flagg v. Stowe*, 85 Ill. 164; *Whitcomb v. Converse*, 119 Mass. 38, 42, *Burdick's Cases*, 575, *Mechem's Cases*, 492; *Moley v. Brine*, 120 Mass. 324; *Bates*, Partn. § 181.

⁵¹ *Brewer v. Browne*, 68 Ala. 210; *Griggs v. Clark*, 23 Cal. 427; *Ligare v. Peacock*, 109 Ill. 94; *Roach v. Perry*, 16 Ill. 37; *Taylor v. Coffing*, 18 Ill. 422; *Farr v. Johnson*, 25 Ill. 522; *Henrickson v. Reinback*, 33 Ill. 299; *Remick v. Emig*, 42 Ill. 342; *Flagg v. Stowe*, 85 Ill. 164; *Moore v. Bare*, 11 Iowa, 198; *Lee v. Lashbrooke*, 8 Dana (Ky.) 214; *Wolfe v. Gilmer*, 7 La. Ann. 583; *Fleischmann v. Gottschalk*, 70 Md. 523, 17 Atl. 384; *Harris v. Carter*, 147 Mass. 313; *Whitcomb v. Converse*, 119 Mass. 38, *Burdick's Cases*, 575, *Mechem's Cases*, 492; *Northrup v. McGill*, 27 Mich. 234; *Hutchinson v. Dubois*, 45 Mich. 143, 7 N. W. 714; *Randle v. Richardson*, 53 Miss. 176; *Henry v. Bassett*, 75 Mo. 89; *Ratzer v. Ratzer*, 28 N. J. Eq. 136; *Evans v. Warner*, 20 App. Div. 230, 47 N. Y. Supp. 16; *Ryder v. Gilbert*, 16 Hun (N. Y.) 163; *Van Name v. Van Name*, 38 App. Div. 451, 56 N. Y. Supp. 659; *Frazer v. Linton*, 183 Pa. 186, 38 Atl. 589; *Peacock v. Peacock*, 16 Ves. 49, 19 Eng. Rul. Cas. 549. There is a presumption of law in favor of an equality of interest in case of the property, as there is of the profits. *Evans v. Warner*, 20 App. Div. 230, 47 N. Y. Supp. 16. "When a partnership relation is found to exist, the presumption is that the partners have equal rights and duties, and, if the right of one is simply in profits, that is to be established by some evidence, or there are some facts to be found from which it may be logically concluded." *Earle v. Art Library Pub. Co.*, 95 Fed. 548. The mere fact that the partners have carried on the business for many years without an accounting between them is insufficient to show that they had agreed to an unequal division of earnings. *Van Name v. Van Name*, 38 App. Div. 451, 56 N. Y. Supp. 659.

benefit of the firm.⁵² This rule rests upon the consideration that it is impossible for the court to set a proportionate value on the services of each partner, where there is no express agreement, since the worth of a particular member to the firm may depend on many things besides the amount of capital brought in by him.⁵³

ATTACHMENT OR EXECUTION FOR INDIVIDUAL DEBT OF
PARTNER.

77. The interest of a partner in the firm property may be seized and sold on attachment or execution for such partner's individual debt.
78. A purchaser at such sale takes subject to the equities of the other partners and the firm creditors.

It is universally admitted that the interest of a partner in the tangible property of the firm is liable to seizure and sale upon attachment or execution in favor of his separate creditor.⁵⁴ "But while the right to levy is thus conceded, the authorities differ widely as to the course to be pursued by the creditor and the officer executing the writ. In some cases the right of the officer to take goods, even temporarily, out of the immediate possession and control of the other partners, is denied, and, in others, a temporary interruption of

⁵² Taylor v. Coffing, 18 Ill. 422; Broadfoot v. Fraser, 73 Vt. 313, 50 Atl. 1054; Avritt v. Russell, 22 Ky. L. R. 752, 58 S. W. 811; Lindl. Partn. p. 349.

⁵³ Pollock, Partn. art. 32.

⁵⁴ Harris v. Phillips, 49 Ark. 58, 4 S. W. 196; Johnson v. Connecticut Bank, 21 Conn. 148; Hurlbut v. Johnson, 74 Ill. 64; Aldrich v. Wallace, 8 Dana (Ky.) 287; Choppin v. Wilson, 27 La. Ann. 444; Lester v. Givens, 74 Mo. App. 395; Clements v. Jessup, 36 N. J. Eq. 569; James v. Burnet, 20 N. J. Law, 635; Nixon v. Nash, 12 Ohio St. 649; Hoaglin v. Henderson, 119 Iowa, 720, 94 N. W. 247.

their possession, in order to take an inventory, is reluctantly permitted; still the decided weight of authority seems to be that the officer may, and, for his own security and that of the execution creditor, should, take possession of all the chattels levied on, and, after the sale of the debtor's interest therein, redeliver the same to the other partners and the purchaser, who are said to be tenants in common of the chattels so sold.⁵⁵

Whatever the practice in any particular jurisdiction may be, it is well settled that the separate creditor or purchaser at the sale acquires only the beneficial interest of the debtor partner, which, as has been seen, is merely his residuary share after the partnership accounts are settled, and the rights of the partners *inter se* adjusted.⁵⁶ The purchaser acquires

⁵⁵ Per Peck, J., in *Nixon v. Nash*, 12 Ohio St. 649. See, generally, upon this subject, *Andrews v. Keith*, 34 Ala. 722; *Wright v. Ward*, 65 Cal. 525, 4 Pac. 534; *Felt v. Cleghorn*, 2 Colo. App. 4; *Davis v. White*, 1 Houst. (Del.) 228; *Anderson v. Cheney*, 51 Ga. 372; *Newhall v. Buckingham*, 14 Ill. 405; *Williams v. Lewis*, 115 Ind. 45, 17 N. E. 262, 7 Am. St. Rep. 403; *Hubbard v. Curtis*, 8 Iowa, 1, 74 Am. Dec. 283; *Hershfield v. Claflin*, 25 Kan. 166, 37 Am. Rep. 237; *White v. Woodward*, 8 B. Mon. (Ky.) 484; *Vicory v. Strausbaugh*, 78 Ky. 425; *Moore v. Pennell*, 52 Me. 162, 83 Am. Dec. 500; *Hutchinson v. Dubois*, 45 Mich. 143, 7 N. W. 714; *Barrett v. McKenzie*, 24 Minn. 20; *Blumenfeld v. Seward Bros.*, 71 Miss. 342, 14 So. 442; *Banks v. Evans*, 10 Smedes & M. (Miss.) 35; *Lloyd v. Tracy*, 53 Mo. App. 175; *Lester v. Givens*, 74 Mo. App. 395; *Morrison v. Blodgett*, 8 N. H. 238, 29 Am. Dec. 653; *Atkins v. Saxton*, 77 N. Y. 195; *Smith v. Orser*, 42 N. Y. 132; *Turner v. Smith*, 1 Abb. Prac. (N. Y.; N. S.) 304; *Gow v. Hinton*, 8 Abb. Prac. (N. Y.) 122; *In re Smith*, 16 Johns. (N. Y.) 102; *Tredwell v. Rascoe*, 3 Dev. Law (N. C.) 50; *Deal v. Bogue*, 20 Pa. 228; *Richard v. Allen*, 117 Pa. 199, 11 Atl. 552, 2 Am. St. Rep. 652; *Saunders v. Bartlett*, 12 Heisk. (Tenn.) 316; *Canales v. Perez*, 65 Tex. 291; *Snell v. Crowe*, 3 Utah, 26, 5 Pac. 522; *Shaver v. White*, 6 Munf. (Va.) 110; *Skavdale v. Moyer*, 21 Wash. 10, 56 Pac. 841; *Heydon v. Heydon*, 1 Salk. 392; *Waters v. Taylor*, 2 Ves. & B. 299; *West v. Skip*, 1 Ves. Sr. 242; *Parker v. Pistor*, 3 Bos. & P. 288.

⁵⁶ *Lester v. Givens*, 74 Mo. App. 395; *Nixon v. Nash*, 12 Ohio St. 650.

merely a right in equity to call for an account, and thus entitle himself to the interest of the partner in the property which shall, upon such settlement, be ascertained to exist.⁵⁷

The officer cannot sell the entire property in any particular goods, but must seize and sell merely the debtor partner's interest therein.⁵⁸ Indeed, it seems to be the better opinion that the levy must be made upon the partner's interest in the whole of the partnership effects, and not merely upon his interest in specific articles,⁵⁹ though, in many instances, only

⁵⁷ 1 Story, Eq. Jur. § 677; *Cox v. Russell*, 44 Iowa, 556; *Nixon v. Nash*, 12 Ohio St. 650, 651; *Clagett v. Kilbourne*, 1 Black (U. S.) 346. If the sheriff, under a separate execution, levy upon and sell the defendant's interest in the partnership property, he cannot deliver possession to the purchaser. He only acquires a right to an account. *Deal v. Bogue*, 20 Pa. 228. And see *Lucas v. Laws*, 27 Pa. 211; *Reinheimer v. Hemingway*, 35 Pa. 432.

⁵⁸ *White v. Jones*, 38 Ill. 159; *Williams v. Lewis*, 115 Ind. 45, 17 N. E. 262, 7 Am. St. Rep. 403; *Edgar v. Caldwell*, *Morris* (Iowa) 434; *Moore v. Pennell*, 52 Me. 162, 83 Am. Dec. 500; *Hutchinson v. Dubois*, 45 Mich. 143, 7 N. W. 714; *Lester v. Givens*, 74 Mo. App. 395; *Tappan v. Blaisdell*, 5 N. H. 190; *Morrison v. Blodgett*, 8 N. H. 238, 29 Am. Dec. 653; *Atkins v. Saxton*, 77 N. Y. 195; *Nixon v. Nash*, 12 Ohio St. 649; *Skavdale v. Moyer*, 21 Wash. 10, 65 Pac. 841; *Clagett v. Kilbourne*, 1 Black (U. S.) 346. A separate execution creditor sells, not the chattels of the partnership, but the interest of the partner, incumbered with joint debts, and the joint creditors have, therefore, no claim on the proceeds. *Doner v. Stauffer*, *Rawle, P. & W.* (Pa.) 198, *Burdick's Cases*, 218. And see *Lucas v. Laws*, 27 Pa. 211; *Smith v. Emerson*, 43 Pa. 456. Where partnership property is sold under separate executions against the individual partners, the proceeds represent the several interests of the partners, and not that of the firm. *Vandike's Appeal*, 57 Pa. 9. See *Flanagan v. McAfee*, 1 Phila. (Pa.) 75.

⁵⁹ *Daniel v. Owens*, 70 Ala. 297; *Church v. Knox*, 2 Conn. 514; *Gerard v. Bates*, 124 Ill. 150, 7 Am. St. Rep. 350; *Stumph v. Bauer*, 76 Ind. 157; *Sirrine v. Briggs*, 31 Mich. 443; *Shaver v. White*, 6 Munf. (Va.) 110; *Wayt v. Peck*, 9 Leigh (Va.) 434.

A levy on an undivided half of a portion of partnership property owned equally by two partners is invalid, where the judgment is against one of the partners individually. *Ernest v. Woodworth*, 124 Mich. 1, 82 N. W. 661.

a part of the goods have been seized, and the undivided share in separate articles has been sold to different individuals.⁶⁰

GARNISHMENT.

As to whether a partner's interest may be reached by garnishment of the firm, the better opinion would seem to be that it cannot,^{60a} but garnishment has been allowed under peculiar circumstances.^{60b}

CONVERSION OF FIRM REALTY INTO PERSONALTY.

79. In England, partnership realty is deemed personalty for all purposes, in the absence of an agreement to the contrary.
80. In the United States, partnership realty is deemed personalty only so far as the exigencies of a settlement of the firm business may require, in the absence of an agreement that it shall be treated as personalty for all purposes.

The English rule, after many fluctuations, became settled that partnership realty is *ipso facto*, in the view of a court of equity, converted into personalty for all purposes, as well for the purpose of the adjustment of the partnership debts

⁶⁰ Felt v. Cleghorn, 2 Colo. App. 4; Hershfield v. Claflin, 25 Kan. 166, 37 Am. Rep. 237; Morrison v. Blodgett, 8 N. H. 238; Phillips v. Cook, 24 Wend. (N. Y.) 389; Dutton v. Morrison, 17 Ves. 206; Waters v. Taylor, 2 Ves. & B. 301. See Lester v. Givens, 74 Mo. App. 399.

^{60a} Fewell v. American Surety Co., 80 Miss. 782, 28 So. 755, 92 Am. St. Rep. 625; Siegel, Cooper & Co. v. Schueck, 167 Ill. 522, 47 N. E. 855.

^{60b} "Where a creditor of a partner seeks an accounting of the partnership matters, and the subjection of the partner's interest to the payment of a debt, he may have garnishment to reach such

and the claims of the partners *inter se* as for the purpose of determining the succession as between the personal representatives of a deceased partner and the heirs at law.⁶¹ This rule has since been expressly declared by statute.⁶² Lindley, in his work on Partnership, bases the rule on the nature of the interest of each partner in the partnership property. He says: "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists in lands or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless, indeed, such conversion is inconsistent with the agreement between the parties."⁶³ It is con-

debtor's individual interest in a debt alleged to be owing to the firm." *O. S. Kelly Co. v. Zarecor* (Tenn. Ch. App.) 62 S. W. 189.

⁶¹ *Crawshay v. Maule*, 1 Swanst. 495; *Darby v. Darby*, 3 Drewry, 495, Ames' Cas. 177; *Essex v. Essex*, 20 Beav. 442; *Thornton v. Dixon*, 3 Brown Ch. 199, Ames' Cas. 175; *Selkrig v. Davies*, 2 Dow, 230; *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. 61.

⁶² English Partnership Act 1890 (53 & 54 Vict. c. 39) §§ 20, 22. See, also, Enc. Laws Eng. tit. "Partnership."

⁶³ Lindl. Partn. p. 687. The English doctrine is also said to have grown out of the peculiar law of inheritance in England, being intended to remedy the hardship of the rule which excludes all but the eldest child from the inheritance, and of the other rule which exempts real estate in the hands of the heir from all but the specialty debts of the ancestor. See *Fairchild v. Fairchild*, 64 N. Y. 471; *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. 61; *Shearer v. Shearer*, 98 Mass. 114. Prof. Burdick deems the suggestion "purely fanciful." Burdick, Partn. p. 87. See, also, *Cookson v. Cookson*, 8 Sim. 529, cited in *Shearer v. Shearer*, 98 Mass. 107, Ames' Cas. 185. In the case of *Pierce's Adm'r v. Trigg's Heirs*, 10 Leigh (Va.) 406, Judge Tucker says: "It has been a vexed question in England, whether the interest of the deceased partner in the real estate, and the proceeds of the sale of that interest, belong to the personal representatives or to the heir. The better opinion gives the fund to the former, since, upon familiar principles, as the land was pur-

ceded that the intention of the parties will prevent an "out and out" conversion, where that intention is manifested.

The general doctrine of "out and out" conversion adopted by the English courts has not been followed to its full extent in the United States, and there seems to be no sufficient reason why it should be.⁶⁴ "The clear current of the American decisions supports the rule that, in the absence of any agreement, express or implied, between the partners to the contrary partnership real estate retains its character as realty, with all the incidents of that species of property, between the partners themselves, and also between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner, that, so far as is necessary, it shall be first applied to the adjustment of partnership obligations, and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. To the extent necessary for these purposes, the character of the property is in equity deemed to be changed

chased with the personalty, and was brought into the firm as stock, it ought, as between the executor and the heir, to replace the fund withdrawn from the personal estate. By placing it as stock in the partnership fund, the deceased evidenced a design to treat it as personalty, and it ought to go accordingly. The representatives of the deceased can claim it only as stock, and as stock in trade it is, *ex vi termini*, personal."

⁶⁴ "There is no policy growing out of our laws of inheritance or the exemption of lands from liability for simple contract debts, which requires the application of such doctrine here. The lands of the ancestor are assets for the payment of all debts, and the persons who take by descent and under the statute of distribution are substantially the same. The necessity for an absolute conversion, supposed to be found in the nature of the partnership interest, seems hardly sufficient to justify a fiction which should deprive real estate of a partnership of its descendible quality, when it is admitted on all hands that partnership real estate, if the necessity arises, is first subject to be appropriated in equity to the discharge of partnership obligations, and the adjustment of the equities between the parties." *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. 61.

into personalty. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected. The working out of the mutual rights which grew out of the partnership relation does not seem to require that the character of the property should be changed until the occasion arises for a conversion, and then only to the extent required. The American rule commends itself for its simplicity. It makes the legal title subservient in equity to the original trust. It disturbs it no further than is necessary for this purpose. The portion of the land not required for partnership equities retains its character as realty, and it leaves the laws of inheritance and descent to their ordinary operation."⁶⁵ If, as sometimes happens, the title to

⁶⁵ *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. 61. See, also, *Columb v. Read*, 24 N. Y. 505; *Fairchild v. Fairchild*, 64 N. Y. 471; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165; *Shearer v. Shearer*, 98 Mass. 114; *Shanks v. Klein*, 104 U. S. 18, *Mechem's Cases*, 164; *Gray v. Palmer*, 9 Cal. 637; *Strong v. Lord*, 107 Ill. 25; *Robinson Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078, *Burdick's Cases*, 165, *Mechem's Cases*, 165; *Pepper v. Pepper*, 24 Ill. App. 316; *Galbraith v. Tracy*, 153 Ill. 54, 38 N. E. 937; *Matlock v. Matlock*, 5 Ind. 403; *Paige v. Paige*, 71 Iowa, 318, 32 N. W. 360, *Mechem's Cases*, 170; *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631; *Goodburn v. Stevens*, 5 Gill. (Md.) 1; *Dyer v. Clark*, 5 Metc. (Mass.) 562; *Harris v. Harris*, 153 Mass. 439, 26 N. E. 1117; *Moran v. Palmer*, 13 Mich. 367; *Godfrey v. White* 43 Mich. 171, 5 N. W. 243; *Woodward-Holmes Co. v. Nudd*, 58 Minn. 236, 59 N. W. 1010, *Burdick's Cases*, 179; *Willet v. Brown*, 65 Mo. 138; *Buckley v. Buckley*, 11 Barb. (N. Y.) 43; *Williams v. Gillies* 75 N. Y. 197, *Burdick's Cases*, 290; *Ludlow's Heirs v. Cooper's Devisees*, 4 Ohio St. 9; *West Hickory Min. Ass'n v. Reed*, 80 Pa. 38, *Moderwell v. Mullison*, 21 Pa. 257; *Foster's Appeal*, 74 Pa. 391; *Appeal of Haerberly*, 191 Pa. 239, 43 Atl. 207; *Pierce v. Covert*, 39 Wis. 252; *Martin v. Morris*, 62 Wis. 418, 22 N. W. 525; *Riddle v. Whitehill*, 135 U. S. 621; *In re Codding*, 9 Fed. 849.

"In this view of the grounds and purpose of such equitable conversion, even regarding all partnership real estate, however the legal

partnership real estate is in the name of one of the partners only, on the death of the other partner, his equitable title descends to his heirs, or goes to his devisees, but subject to the primary claims growing out of the partnership relation.⁶⁶

title may be held, as held in trust for the partnership, this court is disposed to hold, notwithstanding the great weight of authority to the contrary elsewhere, that such real estate is to be converted into personalty only when such conversion is required for the payment of claims against the partnership which are in the nature of debt. Balances due to individual partners for advances to the firm, or for payments made in its behalf, come within this definition. So, also, may capital furnished by one partner, when, by the terms upon which it was furnished, or from the nature and necessity of the case, it is to be repaid in specific amounts, in order to reach the net result, or body of the partnership interests, to which the proportional rights or shares of the several partners attach. In short, whatever is required to be paid or measured in precise sums must be so adjusted; and real estate, converted for that purpose, undoubtedly becomes personalty, and is to be distributed as such when paid over to the party entitled. But the shares in the body of the partnership property—those interests which are not measured by precise amount, but consist in a common proprietorship after all special claims are satisfied—stand upon different footing. These interests are determined by the proportions fixed by the articles or organic law of the partnership. When the beneficial interests and the legal title correspond, it has already been decided that the rights of the partners in real estate so held will be left to adjust themselves by the descent of the legal title, with its incidents, as real estate of the several partners held in common. *Wilcox v. Wilcox*, 13 Allen (Mass.) 252. When the legal title is otherwise held, it is held in trust, and the equitable title descends in like manner, and with like incidents, except as to dower. The office of equity in such case is merely to declare the trusts, and compel the legal title to serve the equitable interests. This is accomplished by directing such conveyances as will make the legal title of the several parties conform to their respective beneficial interests." *Shearer v. Shearer*, 98 Mass. 107, Ames' Cas. 185.

"After the debts of a partnership have been paid, the land belonging to the partnership is considered realty, and not personalty, for purposes of distribution on dissolution, so that the heirs of a deceased partner are entitled to partition." *Comstock v. McDonald*, 126 Mich. 142, 85 N. W. 579.

⁶⁶ *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. 61, citing *Fairchild v. Fairchild*, 64 N. Y. 471.

It has already been seen that, upon the death of the partner holding the legal title, the equitable title of the firm passes to the survivors, while the legal title descends to the heirs, but in trust, to apply it so far as necessary to partnership purposes.⁶⁷ The widow of a deceased partner is entitled to dower in the partnership lands which remain after the claims of the creditors and other partners have been satisfied.⁶⁸

It is generally conceded in all jurisdictions that the question whether partnership real estate shall be deemed absolutely converted into personalty for all purposes, or only converted *pro tanto* for the purpose of partnership equities, may be controlled by the express or implied agreement, of the partners themselves, and that where, by such agreement, it appears that it was the intention of the partners that the lands should be treated and administered as personalty for all purposes, effect will be given thereto.⁶⁹

⁶⁷ See *supra*, §§ 69-71.

⁶⁸ *Brewer v. Browne*, 68 Ala. 210; *Lenow v. Fones*, 48 Ark. 557; *Bopp v. Fox*, 63 Ill. 540; *Strong v. Lord*, 107 Ill. 25; *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631; *Hill v. Cornwall & Bro.'s Assignee*, 95 Ky. 512, 26 S. W. 540, *Burdick's Cases*, 474; *Goodburn v. Stevens*, 5 Gill (Md.) 1; *Dyer v. Clark*, 5 Metc. (Mass.) 562; *Woodward-Holmes Co. v. Nudd*, 58 Minn. 236, 59 N. W. 1010, *Burdick's Cases*, 179; *Warfel v. Calder*, 8 Lanc. Bar. (Pa.) 205. The widow and heirs have only an interest in the net discharged property after all the partnership debts are discharged. *Gray v. Palmer*, 9 Cal. 640. The widow of a deceased partner has no dower in lands conveyed during the continuance of the partnership, although she did not take in the deed. *Woodward-Holmes Co. v. Nudd*, 58 Minn. 236, *Burdick's Cases*, 179. But compare *Fairchild v. Fairchild*, 64 N. Y. 471; *Pugh's Heirs v. Currie*, 5 Ala. 446.

⁶⁹ *Fall River Whaling Co. v. Borden*, 10 Cush. (Mass.) 462; *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. 61; *Maddock v. Astbury*, 32 N. J. Eq. 181; *Ludlow's Heirs v. Cooper's Devisees*, 4 Ohio St. 9; *Leaf's Appeal*, 105 Pa. 505. "In respect to real estate purchased for partnership purposes with partnership funds, and used in the partnership business, the English rule of 'out and out' conversion may be regarded as properly applied on the ground of intention, even in

CHANGING JOINT INTO SEPARATE PROPERTY, AND
VICE VERSA.

81. In the absence of fraud, the partners may by mutual agreement, convert firm property into separate property, or separate property into firm property.

This rule follows logically from the rule already considered, that the agreement and intention of the parties determines what is partnership property, and what is not. But as an agreement changing the character of property from joint to separate or *vice versa* is, in effect, a conveyance of such property, it is subject to the rules of law with respect to fraudulent conveyances. It is more convenient to consider these rules in connection with the rights and liabilities of partners as third persons. It is accordingly reserved for a later chapter.⁷⁰

jurisdictions which have not adopted that rule as applied to partnership real estate acquired under different circumstances, and where no specific intention appeared." *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. 61. See, also, *Collumb v. Read*, 24 N. Y. 505. Where land is purchased by several persons, not for permanent use, but for purposes of sale for profit, it may be regarded in equity as personal property among the partners in the speculation. *Nicoll v. Ogden*, 29 Ill. 323. Followed by *Mauck v. Mauck*, 54 Ill. 281; *Faulds v. Yates*, 57 Ill. 416; *Morrill v. Colehour*, 82 Ill. 618. Compare *Smith v. Ramsey*, 1 Gilm. (Ill.) 373. See, also, *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484. A stipulation in the partnership articles that "all the real estate whatever belonging to the said firm shall be, and is hereby, considered as part of the joint stock and funds of said firm, and as possessing all the incidents and liabilities of partnership funds and personal property, and is hereby by the parties fully impressed with such incidents and liabilities," works a total conversion of the realty into personalty. *Davis v. Smith*, 82 Ala. 198, 2 So. 897, *Burdick's Cases*, 182. For the peculiar doctrine that prevails in Kentucky, see *Partn. (4th Ed.)* § 272, note 1. See, also, *Ludlow's Heirs v. Cooper's Devisees*, 4 Ohio St. 9, wherein an agreement set out was held to work a conversion 'out and out.'

⁷⁰ See post, c. 9.

CHAPTER VIII.

RIGHTS AND LIABILITIES OF PARTNERS INTER SE.

- 82. Articles of Partnership.
- 83. Construction of Articles.
- 84. Right to Participate in Management.
- 85. Duty to Observe Good Faith.
- 86. Obtaining Private Benefits.
- 87-88. Right to Carry on Separate Business.
- 89. Right to Contribution and Indemnity.
- 90. Right to Compensation.
- 91-92. Right to Interest on Balances.
- 93. Partnership Accounts.
- 94. Duty to Conform to Partnership Articles.
- 95. Duty to Exercise Care and Skill.
- 96-98. Power of Majority.
- 99-100. Division of Profits.
- 101. Expulsion of Partner.
- 101-103. Partner's Lien.

ARTICLES OF PARTNERSHIP.

- 82. The formal written agreement defining the respective rights and liabilities of the partners is known as the "Articles of Partnership."

When persons deliberately enter into partnership with each other, it is usual for them to enter into a formal written contract defining their respective rights, duties, and liabilities. This formal agreement is called the "Articles of Partnership." It is always desirable to have formal articles, in order that the partners may know definitely what their rights, duties, and liabilities are, and to remove any opportunity for

controversy in that respect; but unless the partners wish their rights and liabilities to be different from what the law will imply in the absence of special contract on the subject, formal articles are not necessary, and the law will fix their respective rights and liabilities. Some of the principal rights, duties and liabilities of partners are considered in the succeeding sections of this chapter.

Usual Provisions in Articles.

It is generally possible, by express agreement, for partners to make their respective rights and liabilities whatever they see fit.¹

It is usual to insert in formal articles provisions declaring the agreement of the partners with respect to some or all of the following subjects, viz.: The general nature of the business; the commencement and duration of the relation; the name or style of the firm; the capital, advances, and shares of the respective partners; the conduct and powers of the partners; the firm property; the distribution of profits; accounts; transfer of shares; the dissolution and winding up of the firm. Any other special agreement upon any subject connected with the partnership may be inserted. In this connection it has been well said that partnership articles are intended for the guidance of persons who are not lawyers, and that therefore it is not wise to insert only such provisions as are necessary to exclude the application of rules of law which apply where nothing is said to the contrary. "The articles should be so drawn as to be a code of directions, to which the partners may refer as a guide in all their transactions, and

¹ *Crawshay v. Collins*, 15 Ves. 226; *Townsend v. Goewey*, 19 Wend. (N. Y.) 424; *Hall v. Sannoner*, 44 Ark. 34; *Mann v. Butler*, 2 Barb. Ch. (N. Y.) 362. "The duties and obligations arising from the relation between the parties are regulated by the express contract between them so far as the express contract extends and continues in force." *Smith v. Jeyes*, 4 Beav. 505.

upon which they may settle among themselves differences which may arise, without having recourse to courts of justice."²

SAME—CONSTRUCTION OF ARTICLES.

83. The true meaning of the articles of partnership is determined by the ordinary rules governing the construction of contracts.

While the ordinary rules for the construction of contracts apply to partnership articles,³ several rules with respect to the construction of partnership articles have taken a more definite shape.

In the first place, partnership articles are not intended to define, and are not construed as defining, all the rights and obligations of the partners *inter se*. A good deal is left to be understood.⁴ "The transactions of partners with each other cannot be considered merely with reference to the express contract between them. The duties and obligations arising from the relation between the parties are regulated by the express contract between them so far as the express contract extends and continues in force; but if the express contract, or so much of it as continues in force, does not reach to all those duties and obligations, they are implied and enforced by law."⁵

² Lindl. Partn. pp. 411, 412.

³ Bird v. Hamilton, Walk. Ch. (Mich.) 361. Where the language used leaves the matter in doubt, a practical construction put upon it by the partners themselves by a course of conduct for a considerable period will be conclusive. Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728; Snyder v. Seaman, 2 App. Div. 258, 37 N. Y. Supp. 696. All prior negotiations, proposals, guaranties, etc., are merged in the partnership articles. Evans v. Hanson, 42 Ill. 234.

⁴ Lindl. Partn. p. 406.

⁵ Smith v. Jeyes, 4 Beav. 505. See, also, Blisset v. Daniel, 10 Hare, 522; Crawshay v. Collins, 15 Ves. 226.

Another rule of construction is that partnership articles must be construed with reference to the objects of the partnership. All the provisions of the articles are to be construed so as to advance, and not to defeat, those objects. However general the language used may be, it will be restricted to this end.⁶ This rule is of special importance in considering the limits of general powers conferred upon some of the partners, or upon a majority.⁷

Any provision, however worded, will if possible, be construed so as to defeat any attempt by one partner to avail himself of it for the purpose of defrauding his copartner, or of taking and unfair advantage.⁸

Any provision in the articles, however express, may be varied or waived and abandoned by the consent of all the partners, and this consent may be evidenced not only by express words, but by their conduct.⁹

⁶ Lindl. Partn. p. 407. See, also, *Chapple v. Cadell*, Jac. 537. A partner may insist upon a sale and distribution of the partnership property at the time fixed by the partnership articles, though it is not for the interest of the firm. *Mann v. Butler*, 2 Barb. Ch. (N. Y.) 362.

⁷ See *infra*, § 96, "Powers of Majority."

⁸ *Pettyt v. Janeson*, 6 Madd. 146; *Blisset v. Daniel*, 10 Hare, 493. See, also, *infra*, § 96, "Powers of Majority."

⁹ *Const v. Harris*, Turn. & R. 496; *Gage v. Parmelee*, 87 Ill. 329; *Gregg v. Hord*, 129 Ill. 613, 22 N. E. 528; *Thomas v. Lines*, 83 N. C. 191; *Geddes v. Wallace*, 2 Bligh, 270; *Henry v. Jackson*, 37 Vt. 431. "With respect to a partnership agreement, it is to be observed that, all parties being competent to act as they please, they may put an end to or vary it at any moment. A partnership agreement is therefore open to variation from day to day, and the terms of such variation may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and to their mode of conducting their business." *England v. Curling*, 8 Beav. 133, 19 Eng. Rul. Cas. 601. A written agreement as to dividing profits may be extended tacitly by the mutual understanding of the parties, or by their conduct in relation to it. *Robbins v. Laswell*, 27 Ill. 365. A waiver or modification of an express provision may be inferred from

If a partnership originally entered into for a definite term is continued after the expiration of that term, without any new agreement, the articles under which the partnership was first carried on continue, so far as they are applicable, to regulate the rights and liabilities of the partners,¹⁰ but the partnership will be a partnership at will.¹¹

RIGHT TO PARTICIPATE IN MANAGEMENT.

84. Each member of a partnership is entitled *prima facie* to take part in its management.

In the absence of an express agreement to the contrary, the powers of the members of a partnership are equal, even though their shares may be unequal, and there is no right on the part of one or more to exclude another from an equal management in the concern.¹²

a long course of dealing inconsistent with such provision. *McCall v. Moss*, 112 Ill. 493. Where by the partnership agreement a partner is to have a commission on sales made by him, his right thereto is not affected by the fact that he makes no claim therefor during the continuance of the partnership. *Askew v. Springer*, 111 Ill. 662.

¹⁰ *Sangston v. Hack*, 52 Md. 173; *Boardman v. Close*, 44 Iowa, 428; *Metcalf v. Bradshaw*, 145 Ill. 124, 33 N. E. 1116; *Miffin v. Smith*, 17 Serg. & R. (Pa.) 165; *King v. Chuck*, 17 Beav. 325; *Essex v. Essex*, 20 Beav. 442. Compare *Wilson v. Simpson*, 89 N. Y. 619. Where a new partner is admitted, and there is no express continuance of the original articles, it has been held that provisions of the original articles are annulled. *Givens v. Berry*, 21 Ky. L. R. 680, 52 S. W. 942.

¹¹ *Lindl. Partn.* p. 410.

¹² *Lindl. Partn.* p. 301. "In partnerships, the good faith of the partners is pledged mutually to each other that the business shall be conducted with their actual personal interposition, so that each may see that the other is carrying it on for their mutual advantage." Per Lord Eldon in *Peacock v. Peacock*, 16 Ves. 51. See, also, *Katz v. Brewington*, 71 Md. 79, 20 Atl. 139.

It is of course competent for partners to agree that one or more of them shall take no active part in the management of the partnership affairs, and where they do so agree, such partners have no right to transact partnership business, or to bind the firm. Nevertheless, the powers of partners being presumptively equal, a third person dealing with a partner without notice of any limitation upon his authority may hold the firm liable to him, just as though the authority had been rightfully exercised,¹³ but of course such partner will be liable to his copartners for any loss resulting to them from his unauthorized act.

DUTY TO OBSERVE GOOD FAITH.

85. Partners must observe the utmost good faith towards each other in all their transactions.

The utmost good faith is due from every member of a partnership towards every other member.¹⁴ This obligation to perfect fairness and good faith is not confined to persons who

¹³ See post, c. 9, "Rights and Liabilities of Partners as to Third Persons."

¹⁴ *Platt v. Platt*, 2 *Thomp. & C.* 39; *Lockwood v. Beckwith*, 6 *Mich.* 168; *Coursin's Appeal*, 79 *Pa.* 220; *Lay v. Emery*, 8 *N. D.* 404, 79 *N. W.* 1053. In *Roby v. Colehour*, 135 *Ill.* 300, 338, 25 *N. E.* 777, the court said: "In cases of partnerships, which usually involve also the relations of joint ownership, trust, and agency, the utmost good faith is due from every member of the partnership toward every other member; and if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honor." "Partners, in all the scope of the partnership business, in all dealings with each other as to partnership affairs or property, stand in a fiduciary relation, the one to the other, and are bound to the uberrima fides of such relation. The essential idea was

actually are partners. It extends to persons negotiating for a partnership, but between whom no partnership as yet exists,¹⁵ and also to persons who have dissolved partnership, but who have not completely wound up and settled the partnership affairs.¹⁶ The sale of a partnership interest by one partner to another will be sustained only when made for a fair consideration, and upon a full disclosure of all information as to the value of the property.¹⁷ This requirement of good faith has been said to be the basis of the law of partnership so far as it relates to the rights and obligations of the partners between themselves.¹⁸

well expressed by Stone, C. J., in *Goldsmith v. Eichold*, 94 Ala. 116, 10 So. 80. 'Each partner is, in one sense, a trustee—a trustee for the newly-created entity, the partnership, and for each member of the firm, who thus becomes a beneficiary under the trust. He is more—he is a trustee and a cestui que trust. A trustee, so far as his own duties bind him; a cestui que trust, so far as his duties rest on his copartners. And it is sometimes said that each partner is both principal and agent—a principal to the extent he represents his own interest, but an agent so far as he represents his copartners.' " *Bestor v. Barker*, 106 Ala. 240, 17 So. 389.

¹⁵ *Bloom v. Lofgren*, 64 Minn. 1, 65 N. W. 960, *Burdick's Cases*, 501; *Hichens v. Congreve*, 1 Rus. & M. 150; *Harlow v. La Brum*, 151 N. Y. 278, 45 N. E. 859, *Burdick's Cases*, 502; *Esmond v. Seeley*, 28 App. Div. 292, 51 N. Y. Supp. 36; *Densmore Oil Co. v. Densmore*, 64 Pa. 43. But see *Uhler v. Semple*, 20 N. J. Eq. 288, holding that the rule of caveat emptor applies to persons bargaining with each other for a partnership.

¹⁶ *Lindl. Partn.* p. 569; *Renfrow v. Pearce*, 68 Ill. 125; *Pierce v. McClelland*, 93 Ill. 245; *Wells v. McGeoch*, 71 Wis. 196, 35 N. W. 769.

¹⁷ *Warren v. Schainwald*, 62 Cal. 56; *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662; *Baker v. Cummings*, 4 App. Cas. (D. C.) 230; *Pomerooy v. Benton*, 57 Mo. 531; *Wright v. Duke*, 91 Hun, 409, 36 N. Y. Supp. 853; *Sexton v. Sexton*, 9 Grat. (Va.) 204.

¹⁸ *Lindl. Partn.* p. 304.

SAME—OBTAINING PRIVATE BENEFITS.

86. A partner will not be permitted to obtain for himself profits or benefits arising from a transaction concerning firm interests.

"It is clear that every partner must account to the firm for every benefit derived by him, without the consent of his copartners, from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connection."¹⁹ A partner cannot secure for himself that which it is his duty to obtain, if at all, for the firm.²⁰ "Good faith requires that a partner shall not obtain a private advantage at the expense of the firm. He is bound, in all transactions affecting the partnership, to do his best for the common body, and to share with his copartners any benefit which he may have been able to obtain from other people, and

¹⁹ *Aas v. Benham*, [1891] 2 Ch. 255, 65 *Law Times* (N. S.) 25, 19 *Eng. Rul. Cas.* 589. See, also, *Raymond v. Vaughn*, 18 Ill. 256. In *Latta v. Kilbourn*, 150 U. S. 524, 541, *Burdick's Cases*, 503, *Mechem's Cases*, 212, Mr. Justice Jackson, speaking for the court, said that it is "well settled that one partner cannot, directly or indirectly, use partnership assets for his own benefit; that he cannot, in conducting the business of a partnership, take any profit clandestinely for himself; that he cannot carry on the business of the partnership for his private advantage; that he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity, without being accountable to his copartners for any profit that may accrue to him therefrom; that he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business."

²⁰ *Kimberly v. Arms*, 129 U. S. 512; *Hill v. Miller*, 78 Cal. 149; *Tebbetts v. Dearborn*, 74 Me. 392; *Filbrun v. Ivers*, 92 Mo. 388, 4 S. W. 674; *Coursin's Appeal*, 79 Pa. 220.

in which the firm is, in honor and conscience, entitled to participate."²¹ Thus, a partner cannot buy up a claim against the firm. If he takes an assignment of such a claim, he holds it for the firm, and is entitled to charge against the firm only the amount he actually paid out.²² So, a partner cannot acquire an adverse title or interest in the property of the partnership, and hold it against the firm.²³ A partner who secretly obtains in his own name a renewal of the lease of the premises upon which the firm transacts business must hold it for the firm.²⁴ If a partner is buying or selling property for a firm, he cannot sell to it or buy from it at a profit to him-

²¹ Lindl. Partn. p. 305; *Carter v. Horne*, 1 Eq. Cas. Abr. 7.

²² *Easton v. Strouther*, 57 Iowa, 506, 10 N. W. 877; *Filbrun v. Ivers*, 92 Mo. 388, 4 S. W. 674. It operates as payment of the claim in the absence of some equity to keep it alive. *Coleman v. Coleman*, 78 Ind. 344; *Booth v. Farmers' & Mechanics' Nat. Bank*, 74 N. Y. 228.

²³ *Crosswell v. Lehman*, 54 Ala. 363; *Laffan v. Naglee*, 9 Cal. 662; *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777; *Anderson v. Lemon*, 8 N. Y. 236; *Weston v. Ketcham*, 7 Jones & S. 54; *Eakin v. Shumaker*, 12 Tex. 51; *Forrer v. Forrer's Ex'rs*, 29 Grat. (Va.) 134; *Kinsman v. Parkhurst*, 18 How. 289; *Washburn v. Washburn*, 23 Vt. 576. In the case of *Miller v. O'Boyle*, 89 Fed. 140, plaintiff and defendant entered into a partnership for the purpose of carrying out a contract for public work awarded to them as associates by a Mexican city. Defendant, who was to furnish the money for the enterprise, went to Mexico for the purpose of closing up the contract, and furnishing the required bonds. Owing to the receipt of a false report affecting the financial standing of plaintiff, the authorities refused to close the contract with him as a party. Defendant, without advising plaintiff of the reasons for such refusal, and without plaintiff's knowledge, obtained a contract for the work in his own name. It was held that he held such contract for the partnership, and that plaintiff was entitled to a preliminary injunction to prevent his exclusion from participating in the management of the business.

²⁴ *Sneed v. Deal*, 53 Ark. 152, 13 S. W. 799; *Leach v. Leach*, 18 Pick. (Mass.) 68; *Struthers v. Pearce*, 51 N. Y. 357; *Mitchell v. Reed*, 61 N. Y. 123; *Johnson's Appeal*, 115 Pa. 129, 8 Atl. 36. Compare *Chittenden v. Witbeck*, 50 Mich. 401, 15 N. W. 526; *Phillips v. Reeder*, 18 N. J. Eq. 95.

self.²⁵ Any reward or commissions which a partner obtains from third persons for inducing the firm to enter into particular transactions must be accounted for to the firm.²⁶

Information Acquired as Partner.

If a member of a partnership firm avails himself of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may obtain from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefit.²⁷

²⁵ *Nelson v. Hayner*, 66 Ill. 487; *Emery v. Parrott*, 107 Mass. 95; *Comstock v. Buchanan*, 57 Barb. (N. Y.) 127; *Bentley v. Craven*, 18 Beav. 75; *Dunne v. English*, 18 Eq. Cas. 524. A partner is, by virtue of the partnership relation, incapacitated to purchase or deal in the partnership property for his own benefit, and his purchase will be held to be in trust for the benefit of the copartnership. *Winstanley v. Gleyre*, 146 Ill. 27, 34 N. E. 628.

²⁶ *Hodge v. Twitchell*, 33 Minn. 389, 23 N. W. 547; *Newell v. Cochran*, 41 Minn. 374, 43 N. W. 84; *Whitman v. Bowden*, 27 S. C. 53, 2 S. E. 630; *Grant v. Hardy*, 33 Wis. 668. See *Short v. Stevenson*, 63 Pa. 95. A contract between a partner and a third party, that such a commission should be paid, is void. *Gleason v. Chicago, M. & St. P. R. Co. (Iowa)*, 43 N. W. 517.

²⁷ *Aas v. Benham* [1891], 2 Ch. 244, 65 Law Times (N. S.) 25, 19 Eng. Rul. Cas. 582; *Latta v. Kilbourn*, 150 U. S. 524, *Burdick's Cases*, 503, *Mechem's Cases*, 212. Compare *Cassels v. Stewart*, L. R. 6 App. Cas. 64. "As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that, if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business, the profits of which belong to the firm, he must account to the firm, for any benefits which he may have derived from such information; but there is no principle or authority which entitles a firm to benefits

RIGHT TO CARRY ON SEPARATE BUSINESS.

87. A partner has no right to carry on a separate business in competition with the firm.
88. In the absence of any agreement to the contrary, a partner may carry on a separate non-competing business.

Competing Business.

It is clear that a partner is not entitled to carry on a separate business of the same nature as that of the firm. If he does engage in a business which competes with the firm, he must account to his copartners for the profits derived therefrom.²⁸ Thus, a partner in a firm constituted for the pur-

derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business, nor does the language of Lord Justice Cotton in *Dean v. Macdowell*, 8 Ch. Div. 345, warrant any such notion. By 'information which the partnership is entitled to' is meant information which can be used for the purposes of the partnership. It is not the source of the information, but the use to which it is applied, which is important in such matters. To hold that a partner can never derive any personal benefit from information which he obtains as a partner would be manifestly absurd. Suppose a partner to become, in the course of carrying on his business, well acquainted with a particular branch of science or trade, and suppose him to write and publish a book on the subject, could the firm claim the profits thereby obtained? Obviously not, unless, by publishing the book, he in fact competed with the firm in their own line of business." *Aas v. Benham* [1891], 2 Ch. 255, 65 Law Times (N. S.) 25, 19 Eng. Cas. 589.

²⁸ *Lockwood v. Beckwith*, 6 Mich. 168; *Todd v. Rafferty's Adm'rs*, 30 N. J. Eq. 254; *Long v. Majestre*, 1 Johns. Ch. (N. Y.) 305; *Bast's Appeal*, 70 Pa. 301; *McMahon v. McClernan*, 10 W. Va. 419; *Fletcher v. Ingram*, 46 Wis. 191, 204; 50 N. W. 424; *Latta v. Kilbourn*, 150 U. S. 524, *Burdick's Cases*, 503, *Mechem's Cases*, 212; *Marshall v. Johnson*, 33 Ga. 500; *Aas v. Benham* [1891], 2 Ch. 255. Compare *Pierce v. Daniels*, 25 Vt. 624. A partner may be enjoined from engaging in a competing business. *Marshall v. Johnson*, 33 Ga. 500.

pose of locating and developing mining properties must account to the firm for all mines located and sold by him during the partnership.²⁹ This rule is a necessary consequence of the principle which prohibits a partner from making gains at the expense of his copartners.

Noncompeting Business.

In the absence of an express contract to the contrary, a partner may carry on business outside of the scope of the firm business in a manner consistent with his duties as a partner.³⁰ Even where he has agreed not to carry on any separate business, he need not account to his partners for the profits of a separate business carried on in violation of the agreement unless the business is a competing one, or falls within the scope of the firm business,³¹ though, of course, the other partners would have a remedy by injunction or damages on the contract.

²⁹ *Jennings v. Rickard*, 10 Colo. 385.

³⁰ *Wheeler v. Sage*, 1 Wall. (U. S.) 518; *Belcher v. Whittemore*, 134 Mass. 330, *Burdick's Cases*, 515.

³¹ *Dean v. Macdowell*, 8 Ch. Div. 345; *Aas v. Benham* [1891], 2 Ch. 244, 19 Eng. Rul. Cas. 589; *Latta v. Kilbourn*, 150 U. S. 524, *Burdick's Cases*, 503, *Mechem's Cases*, 212; *Metcalf v. Bradshaw*, 145 Ill. 124, 33 N. E. 1116. One of a firm of attorneys is entitled to retain for himself the compensation he receives for acting as executor of an estate. *Metcalf v. Bradshaw*, 145 Ill. 124, 33 N. E. 1116. "Although a partner carries on a business, for his private benefit, which is similar to that of the firm, he will not be answerable to his copartners for the profits if the business is really different from that of the firm. For example, a member of a firm of warehousemen does not compete with his partnership in owning and managing wharf-boats (citing *Northrup v. Phillips*, 99 Ill. 449). Nor does a partner in a firm of real estate brokers interfere with its business by engaging in the purchase and sale of real estate as an individual speculation [citing *Latta v. Kilbourn*, 150 U. S. 524, *Burdick's Cases*, 503, *Mechem's Cases*, 212.] The case last cited shows that the question of fact whether a partner is carrying on a business in competition with his firm may be a difficult one,—one upon

RIGHT TO CONTRIBUTION AND INDEMNITY.

89. Every partner is entitled to be indemnified in account with the firm for payments and liabilities incurred by him—
- (a) In the ordinary and proper conduct of the business of the firm.
 - (b) In or about anything done for the preservation of the business or property of the firm.³²

In General.

Every member of an ordinary firm is to a certain extent both a principal and an agent.³³ He is liable, as a principal, to the debts and engagements of the firm, and in respect to them he is entitled to contribution from his copartners, for they are joint principals with him, and have no right to throw on him alone the burden of obligations which are theirs as much as his.³⁴ So, each member, as an agent of the firm, is entitled to be indemnified by the firm against losses and expenses *bona fide* incurred by him for the benefit of the firm

which different courts will entertain contradictory opinions, but that the rule of law applicable, when the facts have been determined, is clear and simple." Burdick, Partn. 310, 311.

In *Burr v. De La Vergne*, 102 N. Y. 415, 7 N. E. 366, it was held that inventions made by a partner, although relating to improvements of machinery owned by the firm, are his separate property, unless the making of such inventions is within the scope of the partnership business, or there is an agreement that they shall belong to the firm.

³² The above black-letter text is taken from Pollock, Partn., art. 33. It has been expressly enacted in terms by the English partnership act (§ 24). The body of the text of this section is largely a condensation from Lindl. Partn. p. 367 et seq.

³³ See ante, c. 1, "Agency as a Test of Partnership." See, also, post, c. 9, "Rights and Liabilities as to Third Persons."

³⁴ Lindl. Partn. p. 367; *Downs v. Jackson*, 33 Ill. 464; *Lyons v. Murray*, 95 Mo. 23, 8 S. W. 170; *Forbes v. Webster*, 2 Vt. 58.

while pursuing the authority conferred upon him by the agreement entered into between himself and his copartners.³⁵ But a partner has no right to charge the firm with losses or expenses caused by his own negligence or want of skill, or in disregard of the authority reposed in him,³⁶ and of course the right to contribution or indemnity may be excluded by agreement,³⁷ or by fraud in inducing one to become a partner,³⁸ A purchaser of a partner's share cannot be compelled to make contribution, though, so far as the firm property will go, it may be withheld from him, as he purchases subject to all the firm debts; but if it has been paid over to him, it cannot be recovered back, because it is a voluntary payment.³⁹

A partner may charge the firm with money expended by him for the preservation or continuance of the partnership concern.⁴⁰

³⁵ *Wheeler v. Arnold*, 30 Mich. 304; *Christian & Craft Grocery Co. v. Hill*, 122 Ala. 490, 26 So. 149; *Lyons v. Lyons*, 207 Pa. 7, 56 Atl. 54.

³⁶ *McFadden v. Leeka*, 48 Ohio St. 513, 28 N. E. 874; *Thomas v. Atherton*, 10 Ch. Div. 186; *Cragg v. Ford*, 1 Younge & C. Ch. 280.

³⁷ *Lindl. Partn.* p. 369; *Gillan v. Morrison*, 1 De Gex & S. 421; *In re Worcester Corn Exchange Co.*, 3 De Gex, M. & G. 180; *McFadden v. Leeka*, 48 Ohio St. 513, 28 N. E. 874, *Mechem's Cases*, 232.

³⁸ *Newbigging v. Adam*, 34 Ch. Div. 582.

³⁹ *Clayton v. Davett* (N. J. Eq.), 38 Atl. 308, *Burdick's Cases*, 521.

⁴⁰ *Matthews v. Adams*, 84 Md. 143, 35 Atl. 60; *Ex parte Chippendale*, 4 De Gex, M. & G. 42, wherein *Turner, J.*, placed this rule upon the ground of implied authority. But *Pollock* (Dig. Partn. art. 33) says: "This duty, imposed on the firm to indemnify any one of its members against extraordinary outlays for necessary purposes, is one of a class of duties quasi ex contractu, which are recognized by the law of England only very sparingly, and under special circumstances. It is outside the rules of agency, and has still less to do with trust. Real analogies are to be found in salvage and average." The weight of opinion follows the opinion of *Turner, J.*, supra, rather than that of *Pollock*. See *Wright v. Hunter*, 5 Ves. 793; *Sells v. Hubbell's Adm'rs*, 2 Johns. Ch. (N. Y.) 397; *Meserve v. Andrews*, 106 Mass. 419; *Lee's Ex'x v. Dolan's Adm'x*, 39 N. J. Eq. 193; *Bates v. Lane*, 62 Mich. 132, 28 N. W. 753.

Limit as to Amount of Contribution.

The total amount recoverable is not necessarily limited by the nominal capital of the partnership for losses and expenses may and often do exceed the capital.⁴¹ Neither is the amount which a partner may be called on to contribute necessarily limited to a sum proportionate to his share in the partnership for if some of the partners are unable to contribute their share, the solvent partners must contribute the whole amount.⁴² The limit of contribution may be fixed by express agreement between the members of a firm, and in that case no partner can call upon the others to exceed the amount fixed, however great may have been the amount of his own outlay upon behalf of the firm.⁴³ And on the same principle one who is by the agreement bound to contribute labor as his share of the capital, cannot be compelled to contribute to losses of capital by the other partner.^{43a}

Contribution in Illegal Transactions.

It is a general principle in the law of torts that there is no contribution between wrong-doers; but this doctrine, as applied to partners, is subject to considerable modification. "The claim of a partner to contribution from his copartners in respect of a partnership transaction cannot be defeated on the ground of illegality, unless the partnership is itself an illegal partnership, or unless the act relied on as the basis of the claim is not only illegal, but has been committed by the partner seeking contribution, when he knew or ought to have known of its illegality."⁴⁴ In any of these cases, he can ob-

⁴¹ *Ex parte Chippendale*, 4 Dex, M. & G. 36, 42.

⁴² *McKewan's Case*, 6 Ch. Div. 447.

⁴³ *Scudder v. Ames*, 89 Mo. 496, 14 S. W. 525; *In re Worcester Corn Exchange Co.*, 3 De Gex, M. & G. 180.

^{43a} *Meadows v. Moquot*, 22 Ky. L. R. 1645, 61 S. W. 28.

⁴⁴ *Adamson v. Jarvis*, 4 Bing. 66; *Betts v. Gibbins*, 2 Adol. & El.

tain not assistance against his copartners, and must abide the consequences of his own willful breach of the law.⁴⁵ But if the partnership is not of itself illegal, and if the partner claiming contribution has not himself been personally guilty, his claim will prevail, although the loss in respect of which it is made may have arisen from an unlawful act."⁴⁶

How and When Enforced.

The right to contribution and indemnity cannot be enforced until the partnership has been dissolved, and its accounts settled. As will be seen in a subsequent chapter, it is a general rule that an action at law cannot be maintained by one partner against his copartners in respect to a partnership transaction, and that the only remedy between partners is a suit in equity for a dissolution of the firm, and a settlement of its affairs, in which suit all the rights and liabilities of the partners between themselves will be adjusted.⁴⁷

RIGHT TO COMPENSATION.

90. A partner is not entitled to compensation for services in the transaction of firm business, except—

Exception—

- (a) Where there is an agreement to pay it, and
- (b) Where extra trouble has been caused by a copartner's willful neglect of his duties.

57; *Thomas v. Atherton*, 10 Ch. Div. 185. Compare *Bogges v. Lilly*, 18 Tex. 200.

⁴⁵ *Smith v. Ayrault*, 71 Mich. 475, 39 N. W. 724; *Aubert v. Maze*, 2 Bos. & P. 371; *Clayton v. Davett* (N. J. Eq.), 38 Atl. 308, *Burdick's Cases*, 521.

⁴⁶ *Lindl. Partn.* p. 378. See, also, *Campbell*, 7 Cl. & F. 166; *Horbach's Adm'rs v. Elder*, 18 Pa. 33; *Clayton v. Davett* (N. J. Eq.), 38 Atl. 308, *Burdick's Cases*, 521.

⁴⁷ See post, c. 10, "Actions." See, also, generally, *Lawrence v. Clark*, 9 Dana (Ky.) 257; *Kennedy v. McFadon*, 3 Har. & J. (Md.) 194; *Eddins v. Menefee* (Tenn. Ch.), 54 S. W. 992.

It is the duty of partners to devote their time to carrying on the firm business, and, in the absence of special agreement, they are not entitled to extra compensation therefor, but must be content with their share of the profits.⁴⁸ The mere fact that one partner is more active in the firm business, or performs greater or more valuable services than his copartner, will not entitle him to extra compensation.⁴⁹ A managing partner is not entitled to salary, in the absence of any agreement to pay it.⁵⁰ The rule that a partner is not entitled to compensation for his services applies to services by surviving partners in winding up the business and disposing of partnership assets,⁵¹ and to extra services caused by the sickness of a partner, as this is a risk incidental to the partnership relation, and therefore assumed.⁵²

⁴⁸ *Lewis v. Moffett*, 11 Ill. 392; *Burgess v. Badger*, 124 Ill. 288, 14 N. E. 850; *O'Brien v. Hanley*, 86 Ill. 278; *Ligare v. Peacock*, 109 Ill. 94; *Askew v. Springer*, 111 Ill. 662; *Chamberlain v. Sawyers*, 17 Ky. L. R. 716, 32 S. W. 475; *Major v. Todd*, 84 Mich. 85, 47 N. W. 841; *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243; *Eckert v. Clark*, 14 Misc. 18, 35 N. Y. Supp. 118; *Nicoll v. Town of Huntington*, 1 Johns. Ch. (N. Y.) 166; *Bradford v. Kimberly*, 3 Johns. Ch. (N. Y.) 431; *Paine v. Thacher*, 25 Wend. (N. Y.) 450; *Lyon v. Snyder*, 61 Barb. (N. Y.) 172; *Redfield v. Gleason*, 61 Vt. 220, 17 Atl. 1075; *Taylor v. Dorr*, 43 W. Va. 351; *Lamb v. Wilson*, 3 Neb. (Unoff.) 496, 92 N. W. 167.

⁴⁹ *King v. Hamilton*, 16 Ill. 190; *Lewis v. Moffett*, 11 Ill. 392; *Roach v. Perry*, 16 Ill. 37; *Burgess v. Badger*, 124 Ill. 288, 14 N. E. 850; *Brownell v. Steere*, 29 Ill. App. 358; *Heckard v. Fay*, 57 Ill. App. 20; *Heath v. Waters*, 40 Mich. 457; *Beatty v. Wray*, 19 Pa. 516; *Drew v. Ferson*, 22 Wis. 651.

⁵⁰ *Evans v. Warner*, 2 App. Div. (N. Y.) 230; *Smith v. Brown*, 44 W. Va. 342, 30 S. E. 160.

⁵¹ *Kimball v. Lincoln*, 5 Ill. App. 316; *Barry v. Jones*, 11 Heisk. (Tenn.) 206, 27 Am. Rep. 742; *Denver v. Roane*, 99 U. S. 355. Under special circumstances, a surviving partner may be entitled to extra compensation for services. *Zell's Appeal*, 126 Pa. 329, 17 Atl. 647; *Robinson v. Simmons*, 146 Mass. 167, 15 N. E. 558. See, also, *Thayer v. Badger*, 171 Mass. 279, 50 N. E. 541.

⁵² *Heath v. Waters*, 40 Mich. 457.

Where, however, there is a contract for compensation, either express or implied from the course of the business between the partners, or from the duties and obligations imposed by the articles, it may be recovered.⁵³

A partner may recover compensation for extra trouble and services thrown upon him by a copartner who has willfully neglected his duties as a partner.⁵⁴

RIGHT TO INTEREST ON BALANCES.

91. Interest should be allowed on balances in a partnership accounting whenever there is an express or implied contract to pay it.
92. In the absence of an agreement to pay interest, it should not be allowed or charged upon capital paid in, advances, overdrafts, or undivided profits, but it should be charged on unpaid subscriptions to capital.

The confusion and conflict among the authorities upon the allowance of interest in partnership accountings is so great that one eminent writer upon this subject has said that the

⁵³ *Lewis v. Moffett*, 11 Ill. 392; *Keiley v. Turner*, 81 Md. 269, 31 Atl. 700; *Caldwell v. Leiber*, 7 Paige, Ch. N. Y. 488; *Emerson v. Durand*, 64 Wis. 111, 24 N. W. 129. A promise to pay for extra services will not be implied from the mere rendition of such services, *McAllister v. Payne*, 108 Ga. 517, 34 S. E. 165; no matter how great the excess of services may be, *Lewis v. Moffett*, 11 Ill. 392; *Roach v. Perry*, 16 Ill. 37, and *Burgess v. Badger*, 124 Ill. 288, 14 N. E. 850.

⁵⁴ *Denver v. Roane*, 99 U. S. 355; *Marsh's Appeal*, 69 Pa. 30; *Airey v. Borham*, 29 Beav. 620. Where a partnership contract provided that each member was to render services, and it appeared, on a settlement, that one partner had furnished all the capital, and had exercised complete management and control over the firm affairs, it was proper to allow him credit for his services. *Mattingly v. Stone's Adm'r*, 18 Ky. L. R. 187, 35 S. W. 921, *Burdick's Cases*, 516.

authorities did not justify the deduction from them of any general principle upon this important subject;⁵⁵ and it has very frequently been said that each case must be determined upon its own circumstances, and cannot be governed by any fixed rules.⁵⁶ So far as a statement of the circumstances under which an agreement to pay interest will be implied, this is probably correct, for the existence of such an agreement is a question of fact, and the circumstances tending to prove a fact may be almost infinite in variety. But in cases not governed by agreement, the courts must apply some rule, and out of the conflicting rules adopted by different courts, those stated above in the black-letter text are selected as being in consonance with sound principle. These rules rest upon the principle that interest can be properly allowed in only two classes of cases: First, where there is a contract, express or implied, to pay it, in which case it is recoverable because it is a debt; and, second, where there has been a wrongful delay in the payment of money, interest may be allowed as damages for the delay.⁵⁷

Agreement Express or Implied.

Wherever there is an agreement, either express or implied, to pay interest upon capital paid or unpaid, or upon advances, or undivided profits, it should be allowed or charged in stating the partnership accounts.⁵⁸ The obvious reason is that a

⁵⁵ Lindl. Partn. p. 389.

⁵⁶ *Johnson v. Hartshorne*, 52 N. Y. 173; *Gyger's Appeal*, 62 Pa. 79; *Burdick's Cases*, 586; *Kelley v. Shay*, 206 Pa. 215, 55 Atl. 927; *Buckingham v. Ludlum*, 29 N. J. Eq. 350.

⁵⁷ *Kelley v. Shay*, 206 Pa. 215, 55 Atl. 928. See, also, *Hale, Damages*, p. 144, wherein the principles upon which interest is awarded are examined.

⁵⁸ *Taft v. Schwamb*, 80 Ill. 289; *Burdick's Cases*, 577; *Kelley v. Turner*, 81 Md. 269, 31 Atl. 700; *Payne v. Freer*, 91 N. Y. 43; *Wells v. Babcock*, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575; *Emerson v. Durand*, 64 Wis. 111, 24 N. W. 129; *Prentice v. Elliott*, 72 Ga. 154.

contract to pay interest creates a debt, which is, of course, a proper item of debit or credit. Mercantile usages and the course of trade dealings authorize a demand for interest in cases where it would not otherwise be payable. Accordingly, attention must be paid not only to any express agreement, but also to the practice of each particular firm, and to the custom of the trade it carries on.⁵⁹

Interest in Absence of Agreement—Capital.

Partners are not entitled to interest upon their respective contributions to capital which have been actually paid, in the absence of an express contract. The cases are generally agreed upon this point.⁶⁰ Even if one partner has brought in his stipulated capital, and the other has not, the former is not entitled to interest on his contribution in the final accounting,⁶¹ though some cases take a contrary view, and allow interest in such a case.⁶² It would seem to be more logical to charge the delinquent partner with interest upon the amount he ought to have brought in, but did not, than to allow the other partner interest upon the amount brought in by him in consideration of a share in the profits. The results in the two cases would be very different where the agreed contribu-

Where interest on capital is payable, interest stops at the date of dissolution, unless otherwise agreed. *Johnson v. Hartshorne*, 52 N. Y. 173; *Bradley v. Brigham*, 137 Mass. 545; *Barfield v. Loughborough*, L. R. 8 Ch. 1.

⁵⁹ *Lindl. Partn.* p. 389; *Ex parte Chippendale*, 4 De Gex, M. & G. 36. See, also, *Winchester v. Glazier*, 152 Mass. 316, 25 N. E. 728; *Lockwood v. Roberts*, 171 Mass. 109, 50 N. E. 517.

⁶⁰ *Moss v. McCall*, 75 Ill. 190; *Whitcomb v. Converse*, 119 Mass. 38, *Burdick's Cases*, 575, *Mechem's Cases*, 492; *Brown's Appeal*, 89 Pa. 139.

⁶¹ *Lindl. Partn.* p. 390; *Hill v. King*, 3 De Gex, J. & S. 418; *Stokes v. Hodges*, 11 Rich. Eq. (S. C.) 135; *Clark v. Worden*, 10 Neb. 87, 4 N. W. 413.

⁶² *Hartman v. Woehr*, 18 N. J. Eq. 383; *Ligare v. Peacock*, 109 Ill. 94; *Montague v. Hayes*, 10 Gray (Mass.) 609.

tions were unequal. So, if one partner contributed all the capital, and the other merely his time and services, the former cannot claim interest on his capital.⁶³

The reason why interest should not be allowed on capital is that, in the absence of an express contract to pay it, the reasonable construction of the partnership contract is that the capital or services of the several partners are to be compensated by the stipulated share of the profits, and there is no room for an implied agreement to pay interest. An express contract to pay interest on capital may be implied where the partners themselves have been in the habit of charging interest in their accounts.⁶⁴

Where a partner has agreed to pay in a certain amount of capital, and has failed to do so, it is proper to charge him with interest on the amount, such interest being imposed as damages for the nonpayment at the time it was due.⁶⁵

Same—Advances, Overdrafts, and Undivided Profits.

Interest should not be allowed or charged upon advances, overdrafts, or undivided profits, in the absence of a special agreement to that effect.⁶⁶ Such transactions constitute merely items in the partnership accounts, and until the ac-

⁶³ *Rodgers v. Clement*, 15 App. Div. 561, 44 N. Y. Supp. 516; *Jackson v. Johnson*, 11 Hun (N. Y.) 509; *Tutt v. Land*, 50 Ga. 339; *Day v. Lockwood*, 24 Conn. 185. Interest is not recoverable on an excess of capital contributed to a partnership by one partner, on the ground that he devoted his time and money to carrying on the partnership business, whereas the other partner contributed nothing in the way of time or labor. *Thompson v. Noble*, 108 Mich. 19, 65 N. W. 563.

⁶⁴ *Cooke v. Benbow*, 3 De Gex, J. & S. 1; *Millar v. Craig*, 6 Beav. 433. See, also, *Winchester v. Glazier*, 152 Mass. 316, 25 N. E. 728. But compare *In re James*, 146 N. Y. 78, 40 N. E. 876.

⁶⁵ *Ligare v. Peacock*, 109 Ill. 94; *Hartman v. Woehr*, 18 N. J. Eq. 383.

⁶⁶ *Seibert's Assignee v. Ragsdale*, 19 Ky. L. R. 1869, 44 S. W. 653; *Prentice v. Elliott*, 72 Ga. 154; *Clark v. Worden*, 10 Neb. 87, 4 N. W. 413; *Gilman v. Vaughan*, 44 Wis. 646; *Gage v. Parmelee*, 87 Ill. 329;

counts are settled, and a balance struck, there is no duty to pay over the money, and therefore a charge of interest as damages cannot be justified.⁶⁷ Nevertheless, some authorities take a different view, and hold that interest should be allowed on advances and charged on overdrafts, even in the absence of a special contract to pay it; the transaction being considered in the nature of a loan, where an agreement to pay interest is implied.⁶⁸

PARTNERSHIP ACCOUNTS.

93. Every partner is entitled to have proper accounts kept, and to inspect them at all reasonable times.

Lindley says that it is one of the clearest rights of a partner to have accurate accounts kept of all the firm transactions, and to have free access to them at all reasonable times,⁶⁹ and

Sweeney v. Neely, 53 Mich. 421, 19 N. W. 127; *Ashbrook v. Ashbrook*, 16 Ky. L. R. 593, 28 S. W. 660.

⁶⁷ *Seibert's Assignee v. Ragsdale*, 19 Ky. L. R. 1869, 44 S. W. 653; *Prentice v. Elliott*, 72 Ga. 154; *Miller v. Lord*, 11 Pick. (Mass.) 11.

⁶⁸ *Kelley v. Turner*, 81 Md. 269, 31 Atl. 700; *Matthews v. Adams*, 84 Md. 143, 35 Atl. 60; *Folsom v. Marlette*, 23 Nev. 459, 49 Pac. 39, *Burdick's Cases*, 570; *Coldren v. Clark*, 93 Iowa, 352, 61 N. W. 1045; *Lloyd v. Carrier*, 2 Lans. (N. Y.) 364. Where a partner had misappropriated firm property to his own use, he was held properly chargeable with interest on its value from the date of appropriation. *Folsom v. Marlette*, 23 Nev. 459, 49 Pac. 39, *Burdick's Cases*, 570.

⁶⁹ *Lindl. Partn.* p. 404. See, also, *Godfrey v. White*, 43 Mich. 171; *Hall v. Claggett*, 48 Md. 223; *Webb v. Fordyce*, 55 Iowa, 11, 1 N. W. 385, *Mechem's Cases*, 228; *Dimond v. Henderson*, 47 Wis. 172, 21 N. W. 73; *Hughes v. Ewing*, 162 Mo. 261, 62 S. W. 465; *Rowe v. Wood*, 2 Jac. & W. 558; *Greatrex v. Greatrex*, 1 De Gex & S. 692. Of course a partner has no right to inspect and make copies from the books for an improper purpose. *Trego v. Hunt* [1896], App. Cas. 7, *Burdick's Cases*, 602, *Mechem's Cases*, 199.

this right of inspection has been extended to one induced by fraud to retire from the firm on the ground that there never had been a real termination of his rights as a partner.^{69a} And it is each partner's duty to give the actual bookkeeper all information necessary to enable him to keep proper books. If no books of account are kept, or if they are kept in such a manner as to be unintelligible, or if they are destroyed or wrongfully withheld, and an accounting is directed by the court, every presumption will be made against those to whose negligence or misconduct the nonproduction of proper accounts is due,⁷⁰ but a partner's account should not be charged for losses that may have resulted from an unscientific system of bookkeeping, without any showing of wrong motive.^{70a} In the absence of any different agreement, the books should be kept at the principal place of business of the partnership.⁷¹ One partner has no right to keep the books in his own exclusive custody, or to remove them from the place of business of the firm.⁷²

DUTY TO CONFORM TO PARTNERSHIP ARTICLES.

94. It is the duty of partners to conform in all respects to the partnership agreement, and to confine their acts within the scope of the partnership business.

This duty is too obvious to require extended comment. Contracts are made to be kept, not broken. If the partners

^{69a} *Cohn v. Hessel*, 95 App. Div. 548, 88 N. Y. Supp. 1057.

⁷⁰ *Lindl. Partn.* p. 405. See, also, *Gage v. Parmelee*, 87 Ill. 329; *Pierce v. Scott*, 37 Ark. 308.

^{70a} *Knipe v. Livingston*, 209 Pa. 49, 57 Atl. 1130.

⁷¹ *Pollock, Partn.* art. 39.

⁷² *Taylor v. Davis*, 3 Beav. 388, note.

sustain a loss by reason of their copartner's default in this regard, he must indemnify them.⁷³

DUTY TO EXERCISE CARE AND SKILL.

95. A partner is liable to his copartner for any failure to exercise reasonable care and skill in the conduct of the partnership business.

Partners as agents for their firm in the conduct of its business must exercise reasonable care and skill, and are liable for any loss or damage caused by their failure to do so.⁷⁴ But a partner is not solely liable for losses caused by a lack of discretion or good judgment not amounting to negligence or bad faith, but the loss falls upon all the partners as a firm.⁷⁵ A partner is not entitled to damages from a copartner for mere neglect of the interests of the firm, without any

⁷³ *Murphy v. Crafts*, 13 La. Ann. 519, *Mechem's Cases*, 227; *Marsh's Appeal*, 69 Pa. 30; *Campbell v. Campbell*, 7 Clark & F. 166. The sale by a partner of his interest in the firm proves his right of action for breach of the articles. *Gwens v. Berry*, 21 Ky. L. R. 680, 52 S. W. 942.

⁷⁴ *Yetzer v. Applegate*, 83 Iowa, 726, 50 N. W. 66; *Morris v. Wood* (Tenn. Ch.) 35 S. W. 1013, *Burdick's Cases*, 531.

⁷⁵ *Charlton v. Sloan*, 76 Iowa, 288, 41 N. W. 303; *Morrison v. Smith*, 81 Ill. 221; *Fordyce v. Shriver*, 115 Ill. 530; *Knipe v. Livingston*, 209 Pa. 49, 57 Atl. 130. And see § 89, ante. A partner in a banking business, to whom is left the active management of the business, is not liable for honest errors in judgment, nor for the failure to take the utmost precaution possible, in making investments for the bank. *Exchange Bank of Leon v. Gardner*, 104 Iowa, 176, 73 N. W. 591. A duplicate payment of a bill, made by mistake in the regular course of business by one partner, cannot be charged to him on an accounting unless he was grossly negligent. *Tygart v. Wilson*, 39 App. Div. 58, 56 N. Y. Supp. 827. Losses by injury to the stock in trade or the partnership assets must be borne by the firm. *Savery v. Thurston*, 4 Ill. App. 55.

fraudulent misconduct or willful and positive refusal to perform duties devolving upon him as a partner.⁷⁶

POWER OF MAJORITY.

96. The powers of a majority of the partners may be regulated by agreement.
97. In the absence of special agreement, the decision of the majority is controlling in all matters arising in the ordinary course of the partnership business, provided—

Proviso—The majority must act in good faith.

98. In the absence of special agreement, a majority cannot bind dissenting partners by a change in the nature of the business, or the terms of association.

Express Agreements.

To avoid disputes, the articles of partnership ought to expressly provide how far the decision of a majority of the partners is to be binding upon them all. Whatever provision is agreed to is, of course, binding upon all.

In Absence of Agreement.

In the absence of any express agreement upon the subject, the law fixes the powers of the majority. Whether or not the will of the majority shall prevail in any given matter depends upon the nature of the question at issue, for there is an important distinction between differences which relate to matters incidental to carrying on the legitimate business of a partnership, and differences which relate to matters with which it was never intended that the partnership should concern itself.⁷⁷

⁷⁶ *Brownell v. Steere*, 29 Ill. App. 358, affirmed 128 Ill. 209, 21 N. E. 3.

⁷⁷ *Lindl. Partn.* p. 314

Same—Matters Within Scope of Partnership Business.

Whenever a partnership is formed by more than two persons, in the absence of any express provisions to the contrary, there is always an implied understanding that the acts of the majority are to prevail over those of the minority as to all matters within the scope of the common business.⁷⁸ But even in these matters, the decision of the majority will not prevail unless they have acted in good faith for the benefit of the firm, and not for their own private benefit.⁷⁹ The minority should ordinarily have notice of the proposed action, and an opportunity to present their objections.⁸⁰

Where the partners are equally divided as to any proposed action, those who forbid a change will prevail.⁸¹

Same—Change in Business or Terms of Association.

When the proposed action relates to matters with which it was never intended that the firm should concern itself, it is

⁷⁸ *Johnston v. Dutton's Adm'r*, 27 Ala. 245, *Mechem's Cases*, 304; *Western Stage Co. v. Walker*, 2 Iowa, 504; *Peacock v. Cummings*, 46 Pa. 434; *Faulds v. Yates*, 57 Ill. 416; *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. (N. Y.) 157; *Latta v. Kilbourn*, 150 U. S. 545, *Burdick's Cases*, 503, *Mechem's Cases*, 212.

⁷⁹ *Johnston v. Dutton's Adm'r*, 27 Ala. 245, *Mechem's Cases*, 304; *Western Stage Co. v. Walker*, 2 Iowa, 513, 65 Am. Dec. 789; *Const v. Harris*, Turn. & R. 525; *Blisset v. Daniel*, 10 Hare, 493.

⁸⁰ *Western Stage Co. v. Walker*, 2 Iowa, 513, 65 Am. Dec. 789; *Johnston v. Dutton's Adm'r*, 27 Ala. 245, *Mechem's Cases*, 304; *Story*, Partn. § 123.

⁸¹ *Lindl. Partn.* p. 314; *Johnston v. Dutton's Adm'r*, 27 Ala. 245, *Mechem's Cases*, 304. It is upon this principle that one partner cannot either engage a new or discharge an old servant, against the will of his copartner. *Donaldson v. Williams*, 1 Crompt. & M. 345. Nor, if the lease of the partnership place of business expires, insist on renewing the lease, and continuing the business at the old place. *Clements v. Norris*, 8 Ch. Div. 129.

"The majority of the members of a partnership may, in case of diversity of opinion, manage the business as they see fit, acting in good faith, and within the powers necessary to the management,

well settled that no majority, however large, can lawfully engage the firm in such matters against the will of even one dissenting partner. Thus, the majority can not alter the principle upon which profits are to be dealt with,⁸² or engage the firm in a different business,⁸³ or, generally, make any change in matters provided for by the articles of partnership.⁸⁴ Even a provision in the articles of partnership that the majority should govern is construed not to authorize radical changes of the character under consideration.⁸⁵

DIVISION OF PROFITS.

- 99. In the absence of any special contract on the subject, the majority may determine the time when profits shall be divided, and the amount to be divided.
- 100. For the purpose of periodic division, the excess of ordinary current receipts over ordinary current expenses may be treated as profits.

The mode of ascertaining profits, the times at which profits are to be divided, and the amount to be divided at any one time, ought to be, and usually are, fixed by the partnership agreement; but in the absence of any express or implied agreement upon the subject, the matter may be determined by

and not withheld by the articles of partnership, without being liable for losses which could not be foreseen." *Markle v. Wilbur*, 200 Pa. 457, 50 Atl. 204. See, also, *Kirk v. Hodgson*, 3 Johns. Ch. 400.

⁸² *Const v. Harris*, Turn. & R. 496.

⁸³ *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178. In *Natusch v. Irving*, 2 Coop. Ch. 358, Gow, Partn. 398, Lindl. Partn. p. 316, it was held that the majority stockholders in a joint-stock fire and life insurance company could not change it into a marine insurance company.

⁸⁴ *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573. No change in membership can be so made. See ante, § "Delectus Personarum."

⁸⁵ *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 373.

a majority of the partners.⁸⁶ "Profit is the excess of receipts over expenses, and in winding up a partnership, nothing is properly divisible as profit which does not answer this description. But for the purposes of business, and of facilitating annual divisions of profits, a distinction is made between ordinary and extraordinary receipts and expenses; and whilst all extraordinary expenses are frequently defrayed out of capital, and out of money raised by borrowing, the ordinary expenses are defrayed out of the returns of the business, and the profits divisible in any one year are ascertained by comparing the ordinary receipts with the ordinary expenses of that year."⁸⁷ What losses and expenses ought to be treated as ordinary, and therefore payable out of the current receipts, and what ought to be treated as extraordinary, and payable legitimately out of the capital or money raised by borrowing, is, in the absence of special agreement, a matter to be determined by the majority.⁸⁸

EXPULSION OF PARTNER.

101. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

Where a power of expulsion is conferred, it can only be exercised in good faith, with a view to the benefit of the firm, and not for the private benefit of any of the partners,⁸⁹ and

⁸⁶ Lindl. Partn. p. 393. See, also, *Kennedy v. Kennedy*, 3 Dana (Ky.) 239; *Wood v. Beath*, 23 Wis. 254.

⁸⁷ Lindl. Partn. p. 394.

⁸⁸ Lindl. Partn. p. 394.

⁸⁹ *Blisset v. Daniel*, 10 Hare, 493, 19 Eng. Rul. Cas. 516. The power cannot be exercised merely to enable the continuing partners to appropriate to themselves the share of the expelled partner at a fixed value, less than the true value. *Blisset v. Daniel*, 10 Hare, 493, 19 Eng. Rul. Cas. 517.

the partner whom it is sought to expel must have notice and an opportunity of being heard.⁹⁰ If the expulsion is made in good faith in pursuance of an express power, no reason therefor need be assigned;⁹¹ but if cause be not shown, then it must be very clearly made out that the exercise of the power has been in good faith.⁹² A power of expulsion will be construed with very great strictness.⁹³ An attempted expulsion in violation of these rules is simply void, and the excluded partner's remedy is to claim reinstatement in his rights as a partner, and not an action for damages.⁹⁴

⁹⁰ *Wood v. Woad*, L. R. 9 Exch. 190. The power was not properly exercised at the exclusive instance of one partner, and, in consequence of his representation to the other partners, made without the knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case, and of removing any misunderstanding on the part of his copartners. *Blisset v. Daniel*, 10 Hare, 493, 19 Eng. Rul. Cas. 517.

⁹¹ *Russell v. Russell*, 14 Ch. Div. 471, 49 L. J. Ch. 268, 42 Law Times (N. S.) 112; *Stuart v. Gladstone*, 38 Law Times (N. S.) 557; *Blisset v. Daniel*, 10 Hare, 539, 19 Eng. Rul. Cas. 546. Where a partner can be expelled only for cause, the burden of proof is on the party asserting that a cause of forfeiture has arisen. *Patterson v. Silliman*, 28 Pa. 304. Insolvency would be a sufficient ground for the exercise of the power. *Hubbard v. Guild*, 1 Duer (N. Y.) 662.

⁹² *Blisset v. Daniel*, 10 Hare, 522, 19 Eng. Rul. Cas. 532.

⁹³ *Blisset v. Daniel*, 10 Hare, 505, 19 Eng. Rul. Cas. 527.

⁹⁴ *Wood v. Woad*, L. R. Exch. 190. In *Patterson v. Silliman*, 28 Pa. 304, the partnership agreement provided that the party violating its stipulations should forfeit his interest, and might be excluded, at the option of the other partner, from further participation in the business. The complainant, having been excluded, brought a bill for dissolution, sale of the property, etc. The court held that on the facts proved he was entitled to his prayer; that the burden of proof was on the party asserting that a cause of forfeiture had arisen, and that the respondent in the case at bar had failed to sustain it. In *Gorman v. Russell*, 14 Cal. 531, it was held that a voluntary association for mutual relief in sickness and other similar purposes, which was in effect a partnership, could be dissolved by

PARTNER'S LIEN.

102. Every partner has the right to have the partnership property applied in payment of the debts and liabilities of the firm.
103. Every partner has a right to have whatever may be due to the firm from his copartners, as members thereof, deducted from what would otherwise be payable to them in the partnership.

On a dissolution, every partner is entitled as against the other partners and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets, after such payment, applied in payment of what may be due to the partners, respectively, after deducting what may be due to the firm from them as partners.⁹⁵ This right is what is known as a "part-

a court of equity if it improperly excluded a member. See, also, *Berry v. Cross*, 3 Sandf. Ch. (N. Y.) 1.

⁹⁵ *West v. Skip*, 1 Ves. Sr. 239, 19 Eng. Rul. Cas. 618; *Ex parte Ruffin*, 6 Ves. 119, *Burdick's Cases*, 192, 19 Eng. Rul. Cas. 618. Among the many American cases recognizing the lien of partners on partnership property are *Donelson's Adm'rs v. Posey*, 13 Ala. 752; *Duryea v. Burt*, 28 Cal. 569; *Allen v. Hawley*, 6 Fla. 142; *Pearson v. Keedy*, 6 B. Mon. (Ky.) 128; *Crooker v. Crooker*, 46 Me. 250; *Freeman v. Stewart*, 41 Miss. 138; *Hill v. Beach*, 12 N. J. Eq. 31; *Menagh v. Whitwell*, 52 N. Y. 146, *Burdick's Cases*, 222; *Lane v. Jones*, 9 Lea (Tenn.) 627; *Case v. Beauregard*, 99 U. S. 119, 124; *Mechem's Cases*, 440; *Standish v. Babcock*, 52 N. J. Eq. 628, 29 Atl. 327; *Rainey v. Nance*, 54 Ill. 29; *Hapgood v. Cornwell*, 48 Ill. 64. The lien attaches to partnership land, as well as personalty, regardless of the state of the legal title. *Duryea v. Burt*, 28 Cal. 569; *Crooker v. Crooker*, 46 Me. 250; *Lane v. Jones*, 9 Lea (Tenn.) 627. See, also, *Roberts v. McCarty*, 9 Ind. 16; *Evans v. Hawley*, 35 Iowa, 83; *Divine v. Mitchum*, 4 B. Mon. (Ky.) 488; *Arnold v. Wainwright*, 6 Minn. 358; *Dilworth v. Mayfield*, 36 Miss. 40; *Priest v. Chouteau*,

ner's lien." It exists during the partnership, but does not become active until a dissolution, or until it is sought to ascertain the share of a partner. If a partnership is illegal, no lien exists.⁸⁶ This right or lien is available against a partner, or any one claiming, through him, a share in the partnership assets.⁸⁷ Thus, it is available against the executors of a deceased, or the trustee of a bankrupt partner,⁸⁸ and the assignee of a partner's share.⁸⁹ But it is not available against a purchaser from a partner of specific chattels of the firm.¹⁰⁰

The lien attaches to all the partnership assets at the time of dissolution, or the ascertainment of a partner's share, and to such assets only.¹⁰¹

The lien of partners upon the surplus after the payment of partnership debts extends to whatever is due to or from the firm by or to the members thereof, as such. It does not extend to debts incurred between the firm and its members otherwise than in their character of members.¹⁰²

The lien is lost by the conversion of partnership property into the separate property of a partner,¹⁰³ and of course it is lost as to property validly sold to a stranger.

85 Mo. 398; *Hiscock v. Phelps*, 49 N. Y. 97; *Mendenhall v. Benbow*, 84 N. C. 646; *Digg's Adm'r v. Brown*, 78 Va. 292.

86 *Ewing v. Osbaldiston*, 2 Mylne & C. 88.

87 *Hoyt v. Sprague*, 103 U. S. 613; *Hobbs v. McLean*, 117 U. S. 567.

88 *Croft v. Pyke*, 3 P. Wms. 180.

89 *Cavander v. Bulteel*, L. R. 9 Ch. 79.

100 *In re Langmead's Estate*, 7 De Gex, M. & G. 353.

101 *Payne v. Hornby*, 25 Beav. 280; *West v. Skip*, 1 Ves. Sr. 239, 19 Eng. Rul. Cas. 618. A partner has no lien upon his copartner's individual property for a debt arising on a partnership transaction. *Murphy v. Warren*, 55 Neb. 215, 75 N. W. 573.

102 *Lindl. Partn.* p. 683; *Ryall v. Rowles*, 1 Ves. Sr. 348; *Skipp v. Harwood*, 2 Swanst. 586, note. See, also, *Uhler v. Semple*, 20 N. J. Eq. 288; *Ketchum v. Durkee*, Hoff. Ch. (N. Y.) 538.

103 *Giddings v. Palmer*, 107 Mass. 269; *Robertson v. Baker*, 11 Fla.

106. In the absence of any special agreement upon the subject, a partner has actual authority to bind the firm by all acts necessary for carrying on the partnership business in the usual way.

It has already been seen that the liability of partners, as such, depends upon the principles of agency.¹ The basis of the liability of the members of a firm is in the fact that they are principals in any and every transaction; not because they are credited or held out as partners.² Of course, any act done by a partner within the actual scope of the agency conferred upon him is binding upon all the partners as a firm.³ And a subsequent ratification of an act is equivalent to an antecedent authority.⁴ The actual authority of a partner to bind his copartners depends upon the agreement between them. By express contract, they may confer or withhold whatever authority they see fit, as in the case of any other principal and agent. In the absence of any express contract provision upon the subject, it will be presumed that it was intended that a partner should have authority to bind the firm by all acts necessary for carrying on the business in the

¹ See ante, c. 11. See, also, *Pooley v. Driver*, 5 Ch. Div. 467; *Cox v. Hickman*, 8 H. L. Cas. 268, *Burdick's Cases*, 65, *Mechem's Cases*, 70.

² *Wherman v. McFarlan*, 9 Ohio Dec. 400. Dormant partners, when discovered, are made liable upon this principle. *Brooke v. Washington*, 8 Grat. (Va.) 248, 56 Am. Dec. 142. Where a credit is given to a firm under such a name as "A. & Co.," the latter law presumes that credit was given to every one who is actually a member, known or not. *Elmira Iron & Steel Rolling Mill Co. v. Harris*, 124 N. Y. 280, 26 N. E. 541, *Burdick's Cases*, 398.

³ Where a partner was specially constituted the general agent of the firm, and was in the habit of borrowing money with the knowledge of his copartners, and without objection, the firm would be liable, under the agency, for money borrowed by him. *Hoskinson v. Elliot*, 62 Pa. 393.

⁴ *Casey v. Carver*, 42 Ill. 225; *Miller v. Royal Flint Glass Works*, 172 Pa. 70, 33 Atl. 350, *Burdick's Cases*, 137.

way such a business is usually conducted, and a partner has actual and rightful authority to that extent.⁵ When a partnership is formed for a particular purpose, it is in itself a grant of authority to the acting members of the company to transact its business in the usual way.⁶

Notice to Partner is Notice to Firm.

Notice to an acting partner of any matter relating to the partnership affairs operates as notice to the firm, except in the case of a fraud upon the firm committed by him, or with his consent.⁷

Admissions and Representations.

An admission or representation made by one partner concerning the partnership affairs, and in the ordinary course

⁵ *Ellison v. Stuart*, 2 Pen. (Del.) 179, 43 Atl. 837; *Brooke v. Washington*, 8 Grat. (Va.) 248, 56 Am. Dec. 142. Each partner is the agent of his partners in all matters within the scope of the firm business. *Edwards v. Tracy*, 62 Pa. 374. Each partner is the agent of the partnership as to all contracts and transactions within the scope of the partnership business, as tested by the nature of the particular business and its ordinary usages. *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497. A managing partner of a mine has authority to defray all the necessary and proper expenses incidental to the beneficial working of the mine out of the joint profits derived from the sale of the minerals. *Roberts v. Eberhardt, Kay*, 148, 23 L. J. Ch. 201, 19 Eng. Rul. Cas. 607.

⁶ *Hoskinson v. Elliot*, 62 Pa. 393; *Pooley v. Whitmore*, 10 Helsk. (Tenn.) 634. "The acting partners are identified with the company, and have power to conduct its business in the usual way. This power is conferred by entering into the partnership, and is, perhaps, never to be found in the articles." *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529. The principle that one partner may bind the firm applies as well to partnerships for manufacturing and mechanical purposes as to those for commerce. *Hoskinson v. Elliot*, 62 Pa. 393.

⁷ *Williamson v. Barbour*, 9 Ch. Div. 535; *Lacey v. Hill*, 4 Ch. Div. 549; *Howland v. Davis*, 40 Mich. 546; *Tucker v. Cole*, 54 Wis. 539, 11 N. W. 703; *Gedge v. Cromwell*, 19 App. D. C. 192; *Adams v. Ash-*

of its business, is evidence against the firm,⁸ and may be conclusive by way of estoppel. This, however, does not apply to a representation by one partner as to his authority to bind the firm,⁹ nor probably as to the extent and nature of the business of the firm, for the extent of his authority depends upon the nature of that business.

Acts beyond Actual Authority.

A partner who exceeds his actual authority, as fixed by agreement, or implied in the absence of special agreement, must indemnify his copartners against any consequent loss; but it does not follow that all the partners are not primarily bound to a third person who dealt with a partner, even though he exceeds his actual authority, for a principal is liable for the acts of his agent, not only where they are actually authorized, but also where they are within the apparent scope of the agent's authority.

It is important, therefore, to ascertain what acts are within the apparent scope of a partner's authority, for his actual authority to bind the firm will depend on it, in the absence of special agreement, and his power to bind the firm in the absence of actual authority will also depend upon it.

SAME—APPARENT OR IMPLIED AUTHORITY.

107. A partner has implied authority to do any act necessary for carrying on the firm business in the ordinary way.

man, 203 Pa. 536, 53 Atl. 375; *Loeb v. Stern*, 189 Ill. 371, 64 N. E. 1043.

⁸ See *Fergusson v. Fyffe*, 8 Clark & F. 121; *Williams v. Lewis*, 115 Ind. 45, 17 N. E. 262; *Burgan v. Lyell*, 2 Mich. 102, *Burdick's Cases*, 312; *Griswold v. Haven*, 25 N. Y. 595; *Carls v. Nimmons*, 92 Mo. App. 66.

⁹ *Ex parte Agace*, 2 Cox, 312, 2 Rev. R. 49.

108. The firm is bound by any act within the scope of a partner's implied authority unless—

Exception—

- (a) The act was beyond his real authority, and
- (b) The person dealing with the partner had notice of such fact.

Prima facie, the acts of every partner who does any act for carrying on, in the usual way, business of the kind carried on by the firm of which he is a member binds the firm and his partners.¹⁰

It is competent for the partners, by agreement between themselves, to restrict the authority of any one or more of them to bind the firm, and if such an agreement has been entered into, no act done in contravention of it is binding on the firm with respect to persons having notice of the agreement.¹¹ But such an agreement does not affect persons who deal with

¹⁰ See preceding section. See, also, *Woodruff v. Scalfe*, 83 Ala. 152, 3 So. 311; *Eastman v. Cooper*, 15 Pick. (Mass.) 276; *Irwin v. Williar*, 110 U. S. 499; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459, 12 N. W. 655; *Brooke v. Washington*, 8 Grat. (Va.) 248, 56 Am. Dec. 142; *Crane Co. v. Tierney*, 175 Ill. 79, 51 N. E. 715; *Pooley v. Whitmore*, 10 Helsk. (Tenn.) 634. A partner may enter into contracts in the ordinary business of the firm, sell or pledge goods, draw, negotiate, indorse, or accept bills or other negotiable securities, and do any other acts incident or appropriate to such trade. *Hoskinson v. Elliot*, 62 Pa. 393.

¹¹ *Brooks-Waterfield Co. v. Carpenter*, 21 Ky. L. R. 851, 53 S. W. 40; *Straus v. Kohn*, 83 Ill. App. 497; *Bromley v. Elliot*, 38 N. H. 287; *Baxter v. Rollins*, 90 Iowa, 217, 57 N. W. 838; *Wilson v. Richards*, 28 Minn. 337, 9 N. W. 872; *Bailey v. Clark*, 6 Pick. (Mass.) 372. The partner making the contract is bound, but not the other members of the firm. *G. H. Haulenbeck Advertising Agency v. November* (City Ct. N. Y.) 60 N. Y. Supp. 573. "Where a note has been made or indorsed by a partner in violation of his duty and authority, if the holder who receives it has been guilty of gross negligence in receiving it, it will not be binding in his hands on the partnership." *Dear-dorf's Adm'r v. Thacher*, 78 Mo. 135, citing *Story, Partn.* § 130.

a partner whose authority is thus restricted, without notice of the agreement,¹³ unless, indeed, they do not know or believe him to be a partner; for in that case he has neither real nor, so far as they are concerned, apparent authority to bind the firm.¹³

A partner's implied or apparent authority to bind his firm is limited to acts which are necessary for carrying on the partnership business in the way in which such businesses are usually carried on, and does not extend to acts, which, however urgent, are in this sense unusual.¹⁴

¹³ *Cox v. Hickman*, 8 H. L. Cas. 304, *Mechem's Cases*, 70; *Vance v. Blair*, 18 Ohio, 532; *Leavitt v. Peck*, 3 Conn. 125, *Mechem's Cases*, 308; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529; *Crane Co. v. Tierney*, 175 Ill. 79, 51 N. E. 715; *Hotchin v. Kent*, 8 Mich. 526; *Irwin v. Willmar*, 110 U. S. 499; *Hoskinson v. Elliot*, 62 Pa. 393. Stipulations in articles of partnership are to regulate the rights and conduct of the partners as among themselves. The trading world cannot know them, but must trust to the general powers of all partnerships. *Hoskinson v. Elliot*, 62 Pa. 393. Although articles may deny to one partner the right to bind the firm by his separate act, within the scope of its business, he has the power, for the world cannot know and are not to be affected by such limitations. *Edwards v. Tracy*, 62 Pa. 374.

¹⁴ *Nicholson v. Ricketts*, 2 El. & El. 524; *Holme v. Hammond*, L. R. 7 Exch. 233.

¹⁵ *Hawtayne v. Bourne*, 7 Mees. & W. 595; *Simpson's Claim*, 36 Ch. Div. 532; *Woodruff v. Scaife*, 83 Ala. 152, 3 So. 311; *Brettell v. Williams*, 4 Exch. 630; *Berry v. Folkes*, 60 Miss. 576; *Cotzhausen v. Judd*, 43 Wis. 213; *Barnard v. Lapeer & P. H. Plank Road Co.*, 6 Mich. 274. What is necessary to carry on the business in the ordinary way is the test of authority when no actual authority or ratification can be proved. *Pooley v. Whitmore*, 10 Helsk. (Tenn.) 634. "Where, by the agreement of the parties, the management and control of a business association are given to one of its members, and the nature and character of the business necessarily involve varied duties and responsibilities, the parties to such agreement will be held to have impliedly given to the managing member, where nothing appears to the contrary, the requisite power and authority to discharge such duties and obligations in the ordinary and usual course of business." *Morse v. Richmond*, 97 Ill. 310.

If a partner does an act for a purpose apparently not connected with the firm's ordinary course of business, he is not acting in pursuance of any apparent authority, and the firm will not be bound unless the partner in fact had authority.¹⁵ If, for instance, a partner pledges the credit of the firm for a purpose apparently not connected with its ordinary course of business, e. g., for the purpose, to the knowledge of the creditor, of paying his private debts,¹⁶ the firm is not bound unless he is in fact specially authorized by the other partners.¹⁷ The onus of proving such authority is on the creditor, and it is not sufficient for him to prove that he honestly believed there was such authority,¹⁸ unless the other partners are, by their conduct, estopped from denying the authority.¹⁹

Particular Powers.

Whether or not any particular act is necessary to the transaction of a business in the way it is usually carried on is a question to be determined by the nature of the business, and by the practice of persons engaged in it. This must once have been in all cases, as it still would be in a new case, a question of fact.²⁰ But as to a certain number of frequent

¹⁵ *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251; *Brooks-Waterfield Co. v. Jackson*, 21 Ky. L. R. 854, 53 S. W. 41; *Standard Wagon Co. v. Few*, 119 Ga. 293, 46 S. E. 109.

¹⁶ *Leverson v. Lane*, 13 C. B. (N. S.) 278; *In re Riches*, 4 De Gex, J. & S. 581; *Snaith v. Burrridge*, 4 Taunt. 684.

¹⁷ A partner cannot pledge partnership goods to secure the payment of advances made to buy goods in the name of another firm, of which he was a member. *Brooks-Waterfield Co. v. Carpenter*, 21 Ky. L. R. 851, 53 S. W. 40.

¹⁸ *Kendal v. Wood*, L. R. 6 Exch. 243.

¹⁹ *Kendal v. Wood*, L. R. 6 Exch. 243.

²⁰ Whether partners are engaged in business as merchants on their own account, or are selling on commission for others, is a question of fact, and is to be determined, not by any private agreement between themselves, but by the nature of the business actually done by them with the public. *Alabama Fertilizer Co. v. Reynolds*, 79

and important transactions, there are well-understood usages extending to all trade partnerships, and constantly recognized by the courts. These have become, in effect, rules of law.²¹ But inasmuch as an act which is common in carrying on one kind of business in the usual way may not be required for carrying on business of another kind, any general statement as to what acts are and what acts are not within the implied authority of a partner must be applied with caution, and it has been said that no answer of any value can be given to the abstract question: Can one partner bind his copartners by such and such an act?²² Nevertheless, in the absence of evi-

Ala. 497. Whether a particular act was within the scope of the firm business is a question of fact. *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201.

²¹ In commercial partnerships, the extent of a partner's power to bind the firm is a question of law. *Farmer v. Bank of Wickliffe*, 21 Ky. L. R. 426, 51 S. W. 586. In the case of commission merchants, engaged only in the business of selling on commission for others, purchases on their own account being outside of the scope of that business, one partner cannot bind the other by a purchase on credit in the partnership name. *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497. It is within the implied authority of a member of a firm engaged in manufacturing and selling paper to purchase paper to fill an emergency order. *Buckley v. Wood*, 9 Kulp (Pa.) 189. A partner in a firm formed to cultivate the lands of one of the partners has no implied power to sell the live stock and farming utensils of the firm without the consent of the copartner. *Rutherford v. McDonnell*, 66 Ark. 448, 51 S. W. 1060.

²² "The question whether a given act can or cannot be necessary to the transaction of the business in the way it is usually carried on must evidently be determined by the nature of the business, and by the practice of persons engaged in it. Evidence on both these points is necessarily admissible, and, as readily may be conceived, an act which is necessary for the prosecution of one kind of business may be wholly unnecessary for the carrying on of another in the ordinary way, consequently no answer of any value can be given to the abstract question, Can one partner bind his firm by such an act? Unless having regard to what is usual in business, it can be predicated of the act in question, either that it is one without which no business can be carried on, or that it is one which is not necessary

dence of a usage in the kind of business in question to the contrary, it seems that a partner has implied or apparent authority to do the following acts on behalf of his firm, viz.: Receive payment and give receipts for debts due to his firm;²³ and (probably) retain an attorney to conduct an action to recover such debts;²⁴ assign choses in action;²⁵ draw cheques, not postdated,²⁶ on the bankers of the firm, in the firm name;²⁷ make contracts in reference to the business of the firm;²⁸ insure firm property;²⁹ purchase, on credit of the

for the carrying on any business, whatever. There are obviously very few acts of which such an affirmation can be truly made. The great majority of acts which give rise to doubt are those which are necessary in one business, and not in another. Take, for example, negotiable instruments. It may be necessary for one member of a firm of bankers to draw, accept, or indorse a bill of exchange on behalf of the firm, and to require that each member should put his name to it would be ridiculous; but it by no means follows, nor is it in fact true, that there is any necessity for one of several solicitors to possess a similar power, for it is no part of the ordinary business of a solicitor to draw, accept, or indorse bills of exchange. The question, therefore, Can one partner bind the firm by accepting bills in its name? admits of no general answer. The nature of the business and the practice of those who carry it on (usage or custom of trade) must be known before any answer can be given." *Pooley v. Whitmore*, 10 *Heisk* (Tenn.) 635.

²³ *Stead v. Salt*, 3 *Bing.* 103, 28 *Rev. R.* 603; *Porter v. Taylor*, 6 *Maule & S.* 156, 18 *R. R.* 338; *Steele v. First Nat. Bank*, 60 *Ill.* 23; *Vanderburg v. Bassett*, 4 *Minn.* 242; *Wyckoff v. Anthony*, 9 *Daly* (N. Y.) 417; *Heartt v. Walsh*, 75 *Ill.* 200; *Major v. Hawkes*, 12 *Ill.* 298; *Allen v. Farrington*, 2 *Sneed* (Tenn.) 526.

²⁴ *Court v. Berlin* [1897] 2 *Q. B.* 396.

²⁵ *Ellison v. Stuart*, 2 *Pen.* (Del.) 179, 43 *Atl.* 837; *Sullivan v. Visconti*, 68 *N. J. Law*, 543, 53 *Atl.* 598.

²⁶ *Forster v. Mackreth*, *L. R.* 2 *Exch.* 163.

²⁷ *Laws v. Rand*, 3 *C. B.* (N. S.) 442.

²⁸ *Ellison v. Stuart*, 2 *Pen.* (Del.) 179, 43 *Atl.* 837; *First Nat. Bank v. Rowley*, 92 *Iowa*, 530, 61 *N. W.* 195; *Davis v. Dodson*, 95 *Ga.* 718, 22 *S. E.* 645, *Burdick's Cases*, 338.

²⁹ *Hillock v. Traders' Ins. Co.*, 54 *Mich.* 531, 20 *N. W.* 571; *Osgood v. Glover*, 7 *Daly* (N. Y.) 367; *McGrath v. Home Ins. Co.*, 88 *App.*

firm, goods required for carrying on its business in the usual way;³⁰ sell any of the partnership goods;³¹ transfer firm property in payment of firm debts;³² and engage servants or agents for the partnership business.³³

A sharp distinction is to be noted as to the apparent power of partners between trading and non-trading partnerships. If the partnership is an ordinary trading partnership, a part-

Div. 153, 84 N. Y. Supp. 874; *Peoria Marine & Fire Ins. Co. v. Hall*, 12 Mich. 202.

³⁰ *Bond v. Gibson*, 1 Camp. 185, *Burdick's Cases*, 311, 10 Rev. R. 665; *Gardiner v. Childs*, 8 Car. & P. 345; *Irwin v. Williar*, 110 U. S. 499; *Venable v. Levick*, 2 Head (Tenn.) 351; *McPherson v. Bristol*, 122 Mich. 354, 81 N. W. 254; *Crane Co. v. Tierney*, 175 Ill. 79, 51 N. E. 715; *McDonald v. Fairbanks*, 161 Ill. 124, 43 N. E. 783; *Stecker v. Smith*, 46 Mich. 14, 8 N. W. 583; *Cameron v. Blackman*, 39 Mich. 108; *Chapple v. Davis*, 10 Ind. App. 404.

³¹ *Ellison v. Stuart*, 2 Pen. (Del.) 179, 43 Atl. 837; *Simonton v. Sibley*, 122 U. S. 220; *Hudson v. McKenzie*, 1 E. D. Smith (N. Y.) 358; *Christ v. Firestone* (Pa. Sup.) 11 Atl. 395; *Graser v. Stellwagen*, 25 N. Y. 315; *Bender v. Hemstreet*, 12 Misc. 620, 34 N. Y. Supp. 423; *Sloan v. Moore*, 37 Pa. 217; *Lambert's Case*, Godb. 244, *Burdick's Cases*, 210; *Dore v. Wilkinson*, 2 Starkie, 287. A bill by one claiming to be a partner, to obtain conveyance of an interest in land claimed to be partnership land, which alleges that the partnership was formed for the purpose of buying and selling land, does not state a cause of action against a vendee of one of the alleged partners, since, if the vendor was a partner, he had authority to sell the land. *Young v. Wheeler*, 34 Fed. Rep. 98. As to a sale of all the partnership property, see *Freeman v. Abramson*, 30 Misc. 101, 61 N. Y. Supp. 839; *Lowman v. Sheets*, 124 Ind. 417, 24 N. E. 351, *Mechem's Cases*, 300. Where the partnership was for the cultivation of the land of one partner, the other partner has no implied authority to sell the livestock and farming utensils of the firm. *Rutherford v. McConnell*, 66 Ark. 448, 51 S. W. 1060.

³² *Van Brunt v. Applegate*, 44 N. Y. 544. See, also, *Hanchett v. Gardner*, 138 Ill. 571, 28 N. E. 788; *Janney v. Springer*, 78 Iowa, 617, 43 N. W. 461.

³³ *Beckham v. Drake*, 9 Mees. & W. 79; *Donaldson v. Williams*, 1 Crompt. & M. 345; *Weaver v. Tapscott*, 9 Leigh (Va.) 424; *Brooke v. Washington*, 8 Grat. (Va.) 248, 56 Am. Dec. 142; *Sweeney v. Neely*, 53 Mich. 421, 19 N. W. 127; *Mead v. Shepard*, 54 Barb. (N. Y.) 474;

ner has implied authority to draw, accept, make, and indorse bills of exchange and promissory notes in the name of the firm.³⁴ But a member of a firm of mining adventurers;³⁵ quarry workers;³⁶ farmers;³⁷ planters,³⁸ millers,³⁹ attorneys, solicitors, and counselors at law,⁴⁰ physicians and surgeons,⁴¹ or a partner in establishing and carrying on water works,⁴² or gas works,⁴³ in publishing,⁴⁴ in sugar refining,⁴⁵ in keep-

Barcroft v. Haworth, 29 Iowa, 462. Compare *Straus v. Kohn*, 83 Ill. App. 497; *Palliser v. Erhardt*, 46 App. Div. 222, 61 N. Y. Supp. 191.

³⁴ *In re Riches*, De Gex, J. & S. 581; *Stephens v. Reynolds*, 5 Hurl. & N. 513; *Pooley v. Whitmore*, 10 Helsk. (Tenn.) 636; *Palmer v. Scott*, 68 Ala. 380; *Wagner v. Simmons*, 61 Ala. 143. "In commercial partnerships, a note executed by one member in the firm name, is prima facie the obligation of the firm, and if one of the parties seeks to avoid its payment, the burden of proof lies upon him to show that the note was given in a matter not relating to the partnership business, and that, also, with the knowledge of the holder of the note." *Lee v. First Nat. Bank*, 45 Kan. 9, citing *Deitz v. Regnier*, 27 Kan. 94. To the same effect is *Third Nat. Bank v. Snyder*, 10 Mo. App. App. 213. The taker of a promissory note or bill of exchange of a trading partnership may lawfully presume that it was given in a partnership transaction. *Stevens v. McLachlan*, 120 Mich. 285, 79 N. W. 627.

³⁵ *Dickinson v. Valpy*, 10 Barn. & C. 128; *Ricketts v. Bennett*, 4 C. B. 686; *Bult v. Morrell*, 12 Adol. & El. 745.

³⁶ *Thicknesse v. Bromilow*, 2 Crompt. & J. 425.

³⁷ *Greenslade v. Dower*, 7 Barn. & C. 635, 31 Rev. R. 272; *Ulery v. Glinrich*, 57 Ill. 531.

³⁸ *Prince v. Crawford*, 50 Miss. 344; *Benton v. Roberts*, 4 La. Ann. 216.

³⁹ *Graves v. Kellenberger*, 51 Ind. 66; *Lanier v. McCabe*, 2 Fla. 32.

⁴⁰ *Hedley v. Bainbridge*, 3 Adol. & E. (N. S.) 316; *Levy v. Pyne*, Car. & M. 453; *Friend v. Daryee*, 17 Fla. 116; *Smith v. Sloan*, 37 Wis. 285; *Breckinridge v. Shrieve*, 4 Dana (Ky.) 375.

⁴¹ *Crosthwaite v. Ross*, 1 Hump. (Tenn.) 23; *Lewis v. Reilly*, 1 Q. B. 349.

⁴² *Broughton v. Manchester & Salford Waterworks Co.*, 3 Barn. & Ald. 1.

⁴³ *Bramah v. Roberts*, 3 Bing. N. C. 963.

⁴⁴ *Pooley v. Whitmore*, 10 Helsk. (Tenn.) 629.

⁴⁵ *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251.

ing a tavern,⁴⁶ in owning a ship,⁴⁷ in digging tunnels,⁴⁸ in carrying on a laundry,⁴⁹ in keeping a store and rope-walk,⁵⁰ or in any other nontrading firm,⁵¹ has no such implied authority. So, a member of a trading partnership may borrow money on the credit of the firm,⁵² and for that purpose pledge

⁴⁶ *Cocke v. Branch Bank at Mobile*, 3 Ala. 175.

⁴⁷ *Williams v. Thomas*, 6 Esp. 18.

⁴⁸ *Gray v. Ward*, 18 Ill. 32.

⁴⁹ *Neale v. Turton*, 4 Bing. 149.

⁵⁰ *Wagnon v. Clay*, 1 A. K. Marsh. (Ky.) 257.

⁵¹ *Smith v. Sloan*, 37 Wis. 285; *Third Nat. Bank v. Snyder*, 10 Mo. App. 216; *Deardorf's Adm'r v. Thacher*, 78 Mo. 128; *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 636. "In partnerships of occupation, when one member executes a note in the firm name, the holder must show express or implied authority from the firm to make the note, before a recovery can be had." *Lee v. First Nat. Bank*, 45 Kan. 8, 25 Pac. 196, citing *Smith v. Sloan*, 37 Wis. 285; *Judge v. Braswell*, 13 Bush (Ky.) 67; *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. 1022. In the absence of evidence of a custom or usage among coffee brokers showing that a firm of such brokers is a trading partnership, it cannot be held that negotiable paper signed in the name of the firm by one member thereof, without the other's consent, and not used in the firm business, is good in the hands of an innocent holder for value. *Third Nat. Bank v. Snyder*, 10 Mo. App. 211. "Partners engaged 'in trade' have an authority, implied by law to bind each other by commercial paper executed in the firm name. Partners in other business, such as farming, mining, etc., have prima facie no such authority; but this presumption against lack of authority may be rebutted by showing that the organization and particular purposes of the firm are such as to render it in the special instance necessary, or if not necessary, usual in similar cases." *Deardorf's Adm'r v. Thacher*, 78 Mo. 131.

⁵² *Palmer v. Scott*, 68 Ala. 380; *Wagner v. Simmons*, 61 Ala. 146; *Harris County v. Donaldson*, 20 Tex. Civ. App. 9; *Pahlman v. Taylor*, 75 Ill. 629; *Church v. Sparrow*, 5 Wend. (N. Y.) 223; *Sherwood v. Snow*, 46 Iowa, 481; *Lane v. Williams*, 2 Vern. 292, *Burdick's Cases*, 488; *Bank of Australasia v. Brellat*, 6 Moore, P. C. 152. It is within the power of a partner in the mercantile business to borrow money in the name of the firm, and to bind the firm by an agreement to pay interest on the same at any lawful rate, and to sign the firm name to any writing admitting the fact of borrowing and promising to pay, and thereby furnish evidence against the firm and each of its

the personal property of the firm,⁵³ and (probably) make an equitable mortgage by deposit of deeds or otherwise of its real or leasehold property.⁵⁴

A partner has no implied authority to bind his firm by a submission to arbitration;⁵⁵ to bind his firm by deed, even though the partnership be constituted by deed;⁵⁶ to make an

members. *Walsh v. Lennon*, 98 Ill. 27. In contracts as to negotiable paper, there is no distinction between a general and a special partnership, and the partnership is liable for money borrowed by one partner on the credit of the firm within the scope of its business. *Hoskinson v. Elliot*, 62 Pa. 393. A partnership in the business of buying and selling cattle is a trading partnership, one of the incidents of which is the right to borrow money for the purposes of the business. *Smith v. Collins*, 115 Mass. 388.

⁵³ *Ex parte Bonbonus*, 8 Ves. 540; *Butchart v. Dresser*, 10 Hare, 453, 4 De Gex, M. & G. 542; *Richardson v. Lester*, 83 Ill. 55; *Buettner v. Steinbrecher*, 91 Iowa, 588, 60 N. W. 177; *Woodruff v. King*, 47 Wis. 261, 2 N. W. 452.

⁵⁴ *Lindl. Partn.* p. 152. And see *In re Clough*, 31 Ch. Div. 324.

⁵⁵ *Stead v. Salt*, 3 Bing. 101, 28 Rev. R. 602; *Adams v. Bankart*, 1 Crompt., M. & R. 681; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137; *Buchoz v. Grandjean*, 1 Mich. 367. But see *Hallack v. March*, 25 Ill. 48. See, also, *Davis v. Berger*, 54 Mich. 652, 20 N. W. 629; *Gay v. Waltman*, 89 Pa. 453.

⁵⁶ *Harrison v. Jackson*, 7 Term R. 207, *Burdick's Cases*, 343, 4 Rev. R. 422; *Steiglitz v. Egginton*, Holt, N. P. 141; *Gibson v. Warden*, 14 Wall. (U. S.) 244; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Walsh v. Lennon*, 98 Ill. 27. A release under seal executed by one partner is an exception to this rule and is binding upon the firm. *Dyer v. Sutherland*, 75 Ill. 583; *Gillilan v. Sun Mut. Ins. Co.*, 41 N. Y. 376. A partner constituted by articles "the agent, and to have the general supervision" of the business of the firm, is not therefore authorized to bind the firm by a note under seal. A partner cannot bind the firm by deed; a specialty executed by him in the name of the firm binds himself only. *Hoskinson v. Elliot*, 62 Pa. 393. "There are many respectable authorities to the position that, while one partner cannot bind his copartners by deed, yet, if the instrument used in commercial transactions be valid and effective without a seal, and within the power of a partner, the attempt to seal the same in behalf of the firm will not vitiate its legal effect as an unsealed instrument." *Walsh v. Lennon*, 98 Ill. 32, citing *Pars. Partn.* (2d Ed.) p. 191, note m; *Price v. Alexander*, 2 G. Greene (Iowa) 427; *Lawrence v.*

assignment for the benefit of creditors;⁵⁷ to confess judgment;⁵⁸ to mortgage firm realty;⁵⁹ to give a guaranty on behalf of the firm,⁶⁰ to give accommodation paper;⁶¹ to make his

Taylor, 5 Hill (N. Y.) 107; Sweetzer v. Mead, 5 Mich. 107; Tapley v. Butterfield, 1 Metc. (Mass.) 515, Burdick's Cases, 211; Gibson v. Warden, 14 Wall. (U. S.) 247; and authorities collated in 9 Am. Law Reg. (N. S.) pp. 271, 272. And see *Edwards v. Dillon*, 147 Ill. 14, 35 N. E. 135.

⁵⁷ *Fox v. Curtis*, 176 Pa. 52, 34 Atl. 952; *Wells v. March*, 30 N. Y. 344; *Williams v. Frost*, 27 Minn. 255, 6 N. W. 793; *Loeb v. Pierpoint*, 58 Iowa, 469, 12 N. W. 544; *Shattuck v. Chandler*, 40 Kan. 516, 20 Pac. 225, *Mechem's Cases*, 296. A managing partner has no right to make an assignment for the benefit of creditors. *Cox v. Swofford Bros. Dry Goods Co.*, 2 Ind. T. 61, 47 S. W. 303. But compare *Claf fin Co. v. Evans*, 55 Ohio St. 183, 45 N. E. 3.

⁵⁸ *Hall v. Lanning*, 91 U. S. 160; *Soper v. Fry*, 37 Mich. 236; *Hier v. Kaufman*, 134 Ill. 215, 25 N. E. 517; *North v. Mudge*, 13 Iowa, 496.

⁵⁹ *Napier v. Catron*, 2 Humph. (Tenn.) 534.

⁶⁰ *Brettell v. Williams*, 4 Exch. 623; *Andrews v. Planters' Bank*, 7 Smedes & M. (Miss.) 192; *Clarke v. Wallace*, 1 N. D. 404, *Mechem's Cases*, 301. See, also, *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 631. He may do so for partnership purposes within the scope of the partnership business. *Wilkins v. Pearce*, 5 Denio (N. Y.) 541; *Jordan v. Miller*, 75 Va. 442. An agreement to save a surety for a third person harmless is outside of the scope of the partnership business of a firm of attorneys. *Seeberger v. Wyman*, 108 Iowa, 527, 79 N. W. 290.

⁶¹ *Talmage v. Millikin*, 119 Ala. 40, 24 So. 843. "The giving of accommodation paper," says Mr. Parsons, "is considered so far out of the line of regular commercial business that, if such paper be made and given by one member of a firm, the other party will not be holden to any party chargeable with notice that it is accommodation paper, unless it was made with their consent." 1 Pars. Bills, 141. And thus it is said, "if it appears on the face of the bill that it was signed by a partnership as sureties, this will be notice to any one who may take it that it was given out of the course of partnership business, and no subsequent holder can recover on it without proving the assent of all the parties to the signature." 1 Pars. Bills, 140. The same principle applies to all cases where one indorses on behalf of the firm for third persons. For suretyship and accommodation indorsements, say the authorities, are not within the business of a partnership. 1 Pars. Bills, 140." *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 632.

partners partners with other persons in another business,⁶² to accept shares, though fully paid up, in a company in satisfaction of a partnership debt.⁶³

SAME—RESTRICTION BY DISSSENT.

109. Any act within the apparent or implied authority of a partner will not bind a partner who has given notice that he dissents therefrom, except—

Exceptions—

- (a) Where the act is one which a majority may do, the minority are bound, though they dissent.
 - (b) A partner cannot, by a dissent, impose additional burdens or responsibilities upon third persons.
110. A partner cannot, by dissent, deprive a copartner of powers expressly conferred upon him by the partnership articles.

The implied authority of a partner to do certain acts or make certain contracts may be to some extent, revoked by his copartners, who may thus escape liability for such acts or contracts.⁶⁴ If the implied authority is only apparent, and not actual, of course the communicated dissent of any partner to its exercise operates as notice of that fact, and, as has been seen, the firm is not bound to one having notice that the proposed act is beyond the partner's authority. If the implied authority is actual, the effect of notice of dissent depends upon the nature of the proposed act. If such act relates to

⁶² *Singleton v. Knight*, 13 App. Cas. 788.

⁶³ *Neiman v. Neiman*, 43 Ch. Div. 198. Cf. *Weikersheim's Case*, L. R. 8 Ch. 831.

⁶⁴ *Leavitt v. Peck*, 3 Conn. 124, *Mechem's Cases*, 308; *Knox v. Buffington*, 50 Iowa, 320; *Griswold v. Waddington*, 16 Johns. (N. Y.) 438; *Yeager v. Wallace*, 57 Pa. 365.

a matter as to which the majority have a right to control, they may forbid it, and a third person having notice of this fact can not hold them liable;⁶⁵ but if the majority determine to do the act, the minority will be bound, although they dissent.⁶⁶ The powers of a majority have been already considered.⁶⁷

With the exceptions mentioned in the above black-letter text, one of two partners can always escape liability by giving notice of his dissent to the proposed act, because, as has been seen, in such a case the partner who forbids a change prevails.⁶⁸ A partner cannot, by notice of dissent, impose additional burdens or responsibilities upon a person who has dealt with the firm. Thus, one partner cannot, by notice, take away a debtor's right to pay either partner,⁶⁹ nor can he forbid his partner to pay a firm debt.⁷⁰ A dissent may be waived by subsequently accepting the benefits of the forbidden act.⁷¹

⁶⁵ *Carr v. Hertz*, 54 N. J. Eq. 127, 33 Atl. 194, *Burdick's Cases*, 356.

⁶⁶ *Johnston v. Dutton's Adm'r*, 27 Ala. 245, *Mechem's Cases*, 304; *Nolan v. Lovelock*, 1 Mont. 224.

⁶⁷ See ante, § 96 et seq.

⁶⁸ *Leavitt v. Peck*, 3 Conn. 125, *Mechem's Cases*, 308; *Wipperman v. Stacy*, 80 Wis. 345, 50 N. W. 336, *Mechem's Cases*, 309; *Monroe v. Conner*, 15 Me. 178; *Clements v. Norris*, 8 Ch. Div. 129. But see *Wilkins v. Pearce*, 5 Denio (N. Y.) 541; *Johnson v. Bernheim*, 76 N. C. 139. See, also, ante, § 96, "Powers of Majority." A partner is not liable for the price of goods sold to his copartner over his protest, and after notice that he would not be bound. *Dawson, Blackmore & Co. v. Elrod*, 20 Ky. 1436.

⁶⁹ *Noyes v. New Haven, etc. R. Co.*, 30 Conn. 1; *Steele v. First Nat. Bank*, 60 Ill. 23; *Gillilan v. Sun Mut. Ins. Co.*, 41 N. Y. 376.

⁷⁰ *Mabett v. White*, 12 N. Y. 442. But see *McGrath v. Cowen*, 57 Ohio St. 385, 49 N. E. 338.

⁷¹ *Johnston v. Bernheim*, 86 N. C. 339; *Campbell v. Bowen*, 49 Ga. 417; *Pearce v. Wilkins*, 2 N. Y. 469; *Mason v. Partridge*, 66 N. Y. 633. But see *Monroe v. Conner*, 15 Me. 178.

LIABILITY ON CONTRACTS.

111. All members of a firm are liable upon contracts made by one partner, provided the following conditions concur, viz.:
- (a) The contract must be within the scope of the partner's express or implied authority.
 - (b) The other party must not have had notice of any limitation upon the actual authority of the partner to make the contract.
 - (c) The partner must have acted as agent for the firm, and not as a principal in the transaction.
112. The mere fact that the firm received a benefit from a partner's act is not sufficient to make it liable, if it would not otherwise be liable.

In General.

The liability of partners upon contracts made by their co-partner, so far as it depends upon the scope of his actual or implied authority and notice thereof by the other party, has already been sufficiently considered while treating of a partner's power to bind the firm. One more condition of liability remains to be considered.

In order that a firm may be bound by the acts of a partner or other agent acting within his authority, the agent whose acts are sought to be imputed to his firm must have acted in his character of agent, and not as principal. If he acted as principal, and not as agent, he alone is liable for such acts.⁷² Whether a contract is entered into by an agent, as such, or by

⁷² When a member of a partnership borrows money upon his own account, but representing that it is to be used in the partnership business, the partnership is not liable therefor. To bind the firm, the lender must understand that he is dealing with the firm through the agency of the partner negotiating the loan. *Ah Lep v. Gong Choy*, 13 Or. 205, 9 Pac. 483.

him as a principal, is often, but not always, apparent from the form of the contract.⁷³ It is a question of fact dependent upon the intent, understanding, and agreement of the parties.⁷⁴

Apart from any general rule of law relating to the execution of deeds or negotiable instruments, an act or instrument relating to the business of the firm, and done or executed in the firm name, or in any other manner showing an intention to bind the firm by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners, including secret, silent, dormant, and nominal partners.⁷⁵ Where the connection of the firm with the transaction was unknown or concealed, it may nevertheless be made

⁷³ *Lindl. Partn.*, p. 176. The use of the pronoun "I" instead of "we" in a promissory note does not interfere with its legal effect to bind the firm. *Weirick v. Graves*, 73 Ill. App. 266.

⁷⁴ *Tyler v. Waddingham*, 58 Conn. 375, 20 Atl. 335; *Peterson v. Roach*, 32 Ohio St. 374; *Hoeflinger v. Wells*, 47 Wis. 628, 3 N. W. 589. Whether money lent to a member of a firm is advanced upon his credit or upon that of the firm of which he is a member, and whether the individual check of such person given for the loan is so far payment thereof as to leave the creditor no recourse to the firm, are questions of fact dependent upon the intent, understanding, and agreement of the parties. *Smith v. Collins*, 115 Mass. 338. "When one deals with a partner in matters relating to the partnership business, it ought to be inferred that he deals on the credit of the partnership, unless the circumstances prove that, though apprised of the partnership, he meant to give individual credit. It would be hard to hold him bound to prove that he knew of the partnership, and dealt on its credit." "The presumption is in the affirmative; and to discharge the firm it ought to appear clearly that he gave credit to the individual alone, and intended to absolve the other partners." *Brooke v. Washington*, 8 Grat. (Va.) 248, 56 Am. M. Dec. 145.

⁷⁵ *Locke v. Lewis*, 124 Mass. 1; *Brooke v. Washington*, 8 Grat. (Va.) 248; *Bromley v. Elliot*, 38 N. H. 287; *Reid v. Hollinshead*, 4 Barn. & C. 867; *Ames' Cas.* 29; *Pitkin v. Benfer*, 50 Kan. 108, 31 Pac. 695, *Mechem's Cases*, 313; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 529; *Cleveland v. Woodward*, 15 Vt. 302, *Mechem's Cases*, 318; *Reynolds v. Cleveland*, 4 Cow. (N. Y.) 282.

liable under the rule of undisclosed principal, and the other party has his election to hold the agent personally liable, or to proceed against the firm as a principal.⁷⁶ The necessity, use, and purpose of a firm name have already been considered.⁷⁷

Bills and Notes.

The signature of the firm name to a bill of exchange or promissory note is equivalent to the signature, by the person so signing, of the names of all the persons liable as partners in that firm, but subject to the qualification that no person whose name is not on a bill or note is liable to be sued upon it.⁷⁸ If two persons, A. and another, partners in trade, carry on business in the name of A., and a bill is accepted for partnership purposes by one of them in A.'s name, both partners will be liable thereon.⁷⁹ And unless A. also carries on a separate business in his own name, the onus of proving that a bill in A.'s name is in fact the bill of A., and not of the firm, appears to be on the other partner.⁸⁰ If there are two firms with one name, a member of both firms is liable on all bills in the firm name, but a member of only one of such firms will not be liable unless the person giving the bill had author-

⁷⁶ *Howell v. Adams*, 68 N. Y. 314; *McNair v. Rewey*, 62 Wis. 167, 22 N. W. 339; *Morse v. Richmond*, 97 Ill. 303; *Clement v. British American Assur. Co.*, 141 Mass. 298, 5 N. E. 847.

⁷⁷ See ante, c. 5, "Firm Name."

⁷⁸ English Bills of Exchange Act 1882, §§ 23, 89; *Faith v. Richmond*, 11 Adol. & E. 339; *Beebe v. Rogers*, 3 G. Greene (Iowa) 319; *Drake v. Elwyn*, 1 Caines (N. Y.) 184; *National Bank v. Thomas*, 47 N. Y. 15; *Gates v. Hughes*, 44 Wis. 332; *LeRoy v. Johnson*, 2 Pet. (U. S.) 186.

⁷⁹ *Stephens v. Reynolds*, 5 Hurl. & N. 513. See, also, *Rumsey v. Briggs*, 139 N. Y. 323, 34 N. E. 929.

⁸⁰ See *Yorkshire Banking Co. v. Beatson*, 5 C. P. Div. 115, *Burdick's Cases*, 141; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.) 402; *U. S. Bank v. Binney*, 5 Mason, 189; *Fed. Cas. No. 16,791*.

ity to use, and did in fact use, the name of that firm of which he is a member.⁸¹

Sealed Instruments.

No person can sue or be sued upon an indenture unless he be named as a party thereto.⁸² If an agent executes a deed in his own name, he, and he only, can sue or be sued upon it.⁸³ An agent cannot bind his principal by deed unless his authority to do so is conferred by deed.⁸⁴ It is ruled in England that even if the partnership be constituted by deed an express authority under seal is necessary to enable a partner to bind his firm by deed,⁸⁵ but the American doctrine seems to be that actual authority, given in any form, by the other partners, is all that is needful to permit a partner to bind the firm by an instrument under seal.^{85a} The best and safest method of making a partnership deed is for each partner to sign it with his individual name, and add his seal, though it seems that one seal may be adopted as the seal of all the partners.⁸⁶

Reception of Benefit by Firm.

If a partner does an act on his own behalf, or otherwise, so as not to bind the firm, the firm will not be bound merely by

⁸¹ *Swan v. Steele*, 7 East, 210, 8 Rev. R. 618; *Cushing v. Smith*, 43 Tex. 261; *Miner v. Downer*, 19 Vt. 14; *Hastings Nat. Bank v. Hibbard*, 48 Mich. 452, 12 N. W. 651, *Mechem's Cases*, 322.

⁸² *Lord Southampton v. Brown*, 6 Barn. & C. 718, 30 Rev. R. 511.

⁸³ *Appleton v. Binks*, 5 East, 148, 7 Rev. R. 672; *North Pennsylvania Coal Co.'s Appeal*, 45 Pa. 181; *Tom v. Goodrich*, 2 Johns. (N. Y.) 214.

⁸⁴ *Berkeley v. Hardy*, 5 Barn. & C. 355, 29 Rev. R. 261; *White v. Cuyler*, 6 Term R. 176, 3 Rev. R. 147.

⁸⁵ *Harrison v. Jackson*, 7 Term R. 207, *Burdick's Cases*, 343, 4 Rev. R. 422; *Steiglitz v. Egginton*, Holt, N. P. 141.

^{85a} *Edwards v. Dillon*, 147 Ill. 14, 35 N. E. 135. And see *Matthies v. Herth*, 31 Wash. 665, 72 Pac. 480; *Gordon v. Funkhouser*, 100 Va. 675; *Meyer v. Michaels* (Neb.), 95 N. W. 63.

⁸⁶ *Berkshire Woolen Co. v. Juillard*, 75 N. Y. 535; *Mechem's Cases*,

reason of having obtained the benefit of that act.⁸⁷ Thus, if a partner, without real or apparent authority, borrows money, the lender cannot recover this money from the firm, although the money may have been applied for its benefit.⁸⁸ If, however, the money so borrowed has been expended in paying the legitimate debts of the firm, or for any other legitimate purpose of the firm, the lender is entitled in equity to the repayment of so much of the money as he can show to have been so applied.⁸⁹ "This doctrine is founded partly on the right of the lender to stand in equity in the place of those creditors whose claims have been paid off by his money and partly on the right of the borrowing partner to be indemnified by the firm against liabilities *bona fide* incurred by him for the legitimate purpose of relieving the firm from its debts, or of carrying on its business."⁹⁰

319; *Mackey v. Bloodgood*, 9 Johns. (N. Y.) 285; *Witter v. McNiel*, 4 Ill. 433.

⁸⁷ *Emly v. Lye*, 15 East, 7, 13 Rev. R. 347; *Bevan v. Lewis*, 1 Sim. 376, 27 Rev. R. 205; *Beckhan v. Drake*, 9 Mees. & W. 79; *Wittram v. Van Wormer*, 44 Ill. 525; *National Bank of Commerce v. Meader*, 40 Minn. 325; *Donnally v. Ryan*, 41 Pa. 306; *Morlitzer v. Bernard*, 10 Helsk. (Tenn.) 361; *Ex parte Apsey*, 3 Brown Ch. 265. But a voluntary acceptance of the benefit is a sufficient consideration for a promise to pay. *Siegel v. Chidsey*, 28 Pa. 279.

⁸⁸ *National Bank v. Thomas*, 47 N. Y. 15; *Willis v. Bremner*, 60 Wis. 622, 19 N. W. 403; *Smith v. Craven*, 1 Crompt. & J. 500; *Hawtayne v. Bourne*, 7 Mees. & W. 695. But see *Reid v. Rigby* [1894], 2 Q. B. 40. A partner is not liable for a loan made to his copartner before the firm was formed, and by him put into the firm as his individual property. *Brooks-Waterfield Co. v. Carpenter*, 21 Ky. L. R. 851, 53 S. W. 40.

⁸⁹ *Reid v. Rigby* [1894], 2 Q. B. 40; *Blackburn Bldg. Soc. v. Cunliffe*, 22 Ch. Div. 61; *Baroness Wenlock v. River Dee Co.*, 19 Q. B. Div. 155, 36 Ch. Div. 675, note; *Ex parte Chippendale*, 4 De Gex, M. & G. 19.

⁹⁰ *Lindl. Partn.* p. 191.

LIABILITY FOR TORTS, FRAUDS, AND BREACHES OF TRUST.

113. A firm is liable for damage caused to third persons, or for penalties incurred, by the wrongful act of negligence of any partner acting in the ordinary course of business of the firm, to the same extent as the partner so acting.

A principal is civilly liable for the tortious or fraudulent act, whether criminal or not,⁹¹ of his agent, not only when he has previously authorized or subsequently ratified the act,⁹² but even though he has expressly forbidden it,⁹³ if it has been committed by the agent in the course and as part of his employment.⁹⁴

Upon this principle, a firm is liable for any loss or injury caused to any person not a member of the firm, or for any penalty incurred by any wrongful act or omission of a partner, acting in the ordinary course of the business of the firm, or with the authority of his copartners. The extent of the firm's liability is the same as that of the partner so acting or omitting to act.⁹⁵ Thus, all the members of a firm of lawyers

⁹¹ *Dyer v. Munday* [1895], 1 Q. B. 742. A partner cannot be arrested for the fraud of his copartner. *McNeely v. Haynes*, 76 N. C. 122; *Watson v. Hinchman*, 42 Mich. 27, 3 N. W. 236.

⁹² As to the requisites of ratification, see *Marsh v. Joseph* [1897], 1 Ch. 214; *Wilson v. Tumman*, 6 Man. & G. 236.

⁹³ *Collman v. Mills* [1897], 1 Q. B. 396.

⁹⁴ Partners are liable for the negligence of a servant acting in the course of his employment by the firm. *Stables v. Eley*, 1 Car. & P. 614; *Wood v. Luscomb*, 23 Wis. 287.

⁹⁵ *Pollock*, Partn. art. 23; *Hobbs v. Chicago Packing & Provision Co.*, 98 Ga. 576, 25 S. E. 584, *Burdick's Cases*, 349; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Robinson v. Goings*, 63 Miss. 500; *Ashworth v. Stanwix*, 7 Jur. (N. S.) 467; 3 El. & El. 701; *Mellors v. Shaw*, 1 Best & S. 437; *Chester v. Dickerson*, 54 N. Y. 1, *Mechem's Cases*, 20; *Lathrop v. Adams*, 133 Mass. 471; *Stanhope v. Swafford*, 80 Iowa, 45, 45 N. W. 403; *Attorney-General v. Stranyforth*, Bunb. 97,

or doctors are liable for the negligent advice given by one of them to a client of the firm, or for any damage caused by negligence or want of ordinary skill,⁹⁶ or for the negligent driving of a partnership coach by one of the firm,⁹⁷ or for defamatory statements made to aid the firm business,⁹⁸ or for fraud committed by one of them in the ordinary conduct of their business, although the others do not participate in the fraud, and have no knowledge of it;⁹⁹ and, speaking generally, all the partners are answerable for the penalties incurred by any

Burdick's Cases, 348; *Rolfe v. Dudley*, 58 Mich. 208, 24 N. W. 657. Compare *Graham v. Meyer*, 4 Blatchf. 129, Fed. Cas. No. 5,673. And see *Ozborn v. Woolworth*, 106 Ga. 459, 32 S. E. 581.

⁹⁶ *Blyth v. Fladgate* [1891], 1 Ch. 337; *Haley v. Case*, 142 Mass. 316, 7 N. E. 877; *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, *Mechem's Cases*, 330; *Hyrne v. Erwin*, 23 S. C. 226; *Warner v. Griswold*, 8 Wend. (N. Y.) 665.

⁹⁷ *Moreton v. Hardern*, 4 Barn. & C. 223. See, also, *Champion v. Bostwick*, 18 Wend. (N. Y.) 175.

⁹⁸ *Haney Mfg. Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073; *Lathrop v. Adams*, 133 Mass. 471. In Georgia, under Civ. Code, § 2658, an action for slander will not lie against a partnership. *Ozborn v. Woolworth*, 106 Ga. 459, 32 S. E. 581.

⁹⁹ *Wolf v. Mills*, 56 Ill. 360; *Tenney v. Foote*, 95 Ill. 99; *Banner v. Schlessinger*, 109 Mich. 262, 67 N. W. 116; *Locke v. Stearns*, 1 Metc. (Mass.) 560; *Castle v. Bullard*, 23 How. (U. S.) 173; *Brundage v. Mellon*, 5 N. D. 72, 63 N. W. 209; *Chester v. Dickerson*, 54 N. Y. 1, *Mechem's Cases*, 20; *Walker v. Anglo-American Mortgage & Trust Co.*, 72 Hun (N. Y.) 334; *Gill v. First Nat. Bank* (Tex. Civ. App.) 47 S. W. 751; *Brydges v. Branfill*, 12 Sim. 369. And compare *Marsh v. Joseph* [1897], 1 Ch. 214. But where a partner, by fraudulent representations, induces a stranger to purchase the interest of his copartners, the copartners are not liable for such representations unless they instigate or approve of them, or the partner making such representations acts as their agent in making them. *Schwabacker v. Riddle*, 84 Ill. 517. By 9 Geo. IV, c. 14, § 6, a firm is not liable for the false and fraudulent representation as to the character or solvency of any person, unless the representation is in writing, signed by all the partners—signature by one partner in the name of the firm is not sufficient. *Swift v. Jewsbury*, L. R. 9 Q. B. 301.

breach of a statute, e. g., of the revenue laws.¹⁰⁰ or of the poor law,¹⁰¹ committed by one partner in conducting the partnership business.

On the other hand, the firm will not be liable for the willful or negligent tort of a partner outside the scope of his authority, though to some extent connected with the business of the firm.¹⁰² Thus a firm has been held not liable for the malicious prosecution and false imprisonment by one partner of a person for stealing partnership property.¹⁰³ Of course the other partners may become liable if they subsequently adopt the wrongful act, and receive the benefit of it.¹⁰⁴

Misapplication of Money or Property Received for or in Custody of Firm.

With regard to the liability of a firm for the misapplication of money or property by one of its members, the rule is that (a) where one partner, acting with the scope of his apparent authority, receives the money or property of a third

¹⁰⁰ Attorney-General v. Stranyforth, Bunb. 97, Burdick's Cases, 246; Stockwell v. U. S., 13 Wall. (U. S.) 531.

¹⁰¹ Davies v. Harvey, L. R. 9 Q. B. 433.

¹⁰² Titcomb v. James, 57 Ill. App. 296; Gwynn v. Duffield, 66 Iowa, 708, 24 N. W. 523; Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 479; Einstman v. Black, 14 Ill. App. 381; Grund v. Van Vleck, 69 Ill. 478.

¹⁰³ Arbuckle v. Taylor, 3 Dow, 160; Rosenkranz v. Barker, 115 Ill. 331, 3 N. E. 93, Mechem's Cases, 335; Kirk v. Garrett, 84 Md. 383, 25 Atl. 1089; Farrell v. Friedlander, 63 Hun, 254, 18 N. Y. Supp. 215; Marks v. Hastings, 101 Ala. 165, 13 So. 297.

¹⁰⁴ Durant v. Rogers, 87 Ill. 508. A subsequent approval will not render a partner liable for a trespass by his copartner unless it was in the nature of a taking available to the firm. Grund v. Van Vleck, 69 Ill. 478.

A partnership is liable as such in an action for malicious prosecution, or for malicious arrest, where the suit was instituted, or the process sued out, in furtherance of the partnership interests, and by direct authority of its members. Page v. Citizens' Banking Co., 111 Ga. 73, 51 L. R. A. 463.

person, and misapplies it; and (b) when a firm, in the course of its business, receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, —the firm is liable to make good the loss.

In the cases falling under the first branch (a) of the rule, the money is received by the partner as the real or ostensible agent of the firm, and the firm is therefore, in accordance with the principles above explained, treated as having received it, and is responsible for its proper application. If, however, money has been received by a partner acting outside the scope of his real and apparent authority, the receipt thereof by the partner is not a receipt by the firm, and the firm will not, without more, be liable for the misapplication of the money by the partner who did receive it.¹⁰⁵ Thus it is within the ordinary course of the business of solicitors to receive money from clients for investment on a specific security, but it is not within the ordinary course of such business to receive money for investment generally. If, therefore, a member of a firm of solicitors misapplies money intrusted to him by a client for investment in a particular mortgage, his partners, however innocent, are liable for such misapplication, but, in the absence of special circumstances, they are not liable if the money was received by him for investment generally.¹⁰⁶

In order to bring a case within the second branch (b) of the rule, the money must have been received by the firm in

¹⁰⁵ Willet v. Chambers, Copp. 814; Whitaker v. Brown, 16 Wend. (N. Y.) 504; *Ex parte Eyre*, 1 Phil. 227; Adams v. Sturges, 55 Ill. 468; Palmer v. Scott, 68 Ala. 380; Guillou v. Peterson, 89 Pa. 163; Welker v. Wallace, 31 Ga. 362; Todd v. Jackson, 75 Ind. 272.

¹⁰⁶ Harman v. Johnson, 2 El. & Bl. 61. See, too, Plumer v. Gregory, L. R. 18 Eq. 621. The distinction in question is also illustrated by the two cases of Cleather v. Twisden, 28 Ch. Div. 340, and Rhodes v. Moules [1895], 1 Ch. 236

the course of its business, and have been misapplied while still in the custody of the firm.¹⁰⁷

Employment of Trust Money for Partnership Purposes.

In order to fix the other partners with liability for a breach of trust by one partner, notice of the breach of trust must be brought home to them individually; for, as a general rule in such cases, the money would not have come into the custody of the firm in the course of its business, and the knowledge of one partner would not affect the others, for the fact to be known would have nothing to do with the business of the firm. It is not within the scope of the implied authority of a partner to constitute himself a constructive trustee, and thereby subject his partners to liability in that character.¹⁰⁸ It is not sufficient, in order to fix innocent partners with liability for the misapplication of money belonging to a third party, merely to show that such moneys came into the custody of the firm.¹⁰⁹ But partners who are implicated in a breach

¹⁰⁷ Thus, in *Moore v. Knight* [1891], 1 Ch. 547, a firm of solicitors received from a client certain moneys for investment. The money was not invested but embezzled. The firm for many years rendered accounts to their client of the interest due to her in such form as to represent that the money had been invested, and paid her the interest. Under these circumstances, the estate of a deceased partner, who was not party or privy to the fraud, was held liable to repay the money with interest. See, also, *Blair v. Bromley*, 2 Phil. 354; *Devaynes v. Noble*, 1 Merivale, 611, 15 Rev. R. 169; *Clayton's Case*, 1 Merivale, 572, 15 Rev. R. 161; *Bishop v. Countess of Jersey*, 2 Drew. 143.

¹⁰⁸ *Bienenstok v. Ammidown*, 155 N. Y. 47, 49 N. E. 321; *Mara v. Browne* [1896], 1 Ch. 199; *Gilruth v. Decell*, 72 Miss. 232, *Burdick's Cases*, 351; *Bignold v. Waterhouse*, 1 Maule & S. 255. See, also, cases cited in following note.

¹⁰⁹ *Toof v. Duncan*, 45 Miss. 48; *Dounce v. Parsons*, 45 N. Y. 180; *Bienenstok v. Ammidown*, 155 N. Y. 47, 49 N. E. 321; *Guillou v. Peterson*, 89 Pa. 163; *Englar v. Offutt*, 70 Md. 78, 16 Atl. 497, *Mechem's Cases*, 328; *Ex parte Apsey*, 3 Brown Ch. 265; *Shaffer v.*

of trust will be liable, though they may not have employed the trust moneys in the partnership business.¹¹⁰ The consideration of the circumstances under which persons who are not trustees may be liable for a breach of trust, and under which trust funds may be followed and recovered from the persons in whose hands the funds are, belongs to the law of trusts, and the reader is referred to the standard authorities on that subject.¹¹¹

LIABILITY FOR CRIMES.

113a. A partner is not by reason of the existence of the partnership relation answerable criminally for the acts of his copartners.

Partners are agents of each other in respect of firm affairs and their criminal liability for each other's crimes depends on the principles applicable to the law of agency.^{111a} The ramifications of the subject extend beyond the scope of the present work but it may be stated as a general rule that a partner is liable only for those crimes of his copartner which he expressly or impliedly authorizes, and the existence of the partnership relation is not an implied authorization to commit crimes for the benefit of the firm, nor does ratification relate back to make the ratifying partner criminally liable.^{111b}

Martin, 25 App. Div. 501, 49 N. Y. Supp. 853; *Gilruth v. Decell*, 72 Miss. 232, 16 So. 250, *Burdick's Cases*, 351.

¹¹⁰ *Blyth v. Fladgate* [1891], 1 Ch. 354.

¹¹¹ But see, generally, *Randall v. Knevals*, 27 App. Div. 146, 50 N. Y. Supp. 748.

^{111a} *Robinson v. State*, 38 Ark. 641; *Whitton v. State*, 37 Miss. 379.

^{111b} See *Clark & M. Crimes*, 395; *Clark & S. Agency*, 1138-1142. And see *United States v. Cohn*, 128 Fed. 615.

NATURE OF LIABILITY.

114. The liability of partners upon firm contracts is joint, and not joint and several, except—

Exception—

(a) Where the contract expressly imposes a joint and several liability, and

(b) Where statutes exist changing joint contracts into joint and several contracts.

115. The liability of partners for torts and breaches of trust is joint and several, except—

Exception—The liability of partners in respect to the ownership of land is joint.

In the absence of special circumstances, the liability of partners for the debts and obligations of their firm arising *ex contractu* is joint, and not joint and several.¹¹² A partner may, however, render himself separately liable by holding himself out to the creditor as the only member of the firm,¹¹³ or by the terms of the contract into which he has entered.¹¹⁴

Statutory Changes.

In a number of states, statutes have been enacted declaring, in effect, that all contracts joint by the common law should be

¹¹² *Dob v. Halsey*, 16 Johns. (N. Y.) 34; *Marvin v. Wilber*, 52 N. Y. 270; *Brown v. Fitch*, 33 N. J. Law, 418; *Curtis v. Hollingshead*, 16 N. J. Law, 402; *Crosby v. Jeroloman*, 37 Ind. 264; *Page v. Brant*, 18 Ill. 37; *Slutts v. Chafee*, 48 Wis. 617, 4 N. W. 763; *Mason v. Eldred*, 6 Wall. (U. S.) 231, *Burdick's Cases*, 343; *Cox v. Gille Hardware & Iron Co.*, 8 Okl. 483, 58 Pac. 645; *Hyde v. Casey-Grimshaw Marble Co.*, 82 Ill. App. 83; *Kendall v. Hamilton*, 4 App. Cas. 504.

¹¹³ *Bonfield v. Smith*, 12 Mees. & W. 405. See, also, *Scarf v. Jardine*, 7 App. Cas. 345.

¹¹⁴ *Ex parte Harding*, 12 Ch. Div. 557.

deemed joint and several. These statutes have been generally held applicable to partnership contracts,¹¹⁵ though in a few states it has been held that the liability of partners is joint, notwithstanding such statutes.¹¹⁶

Torts and Breach of Trust.

The liability of partners for loss occasioned by any wrongful act or omission, or for the misapplication of money or property for which the firm is liable, is joint and several,¹¹⁷ as is also their liability for any breach of trust imputable to the firm.¹¹⁸ "To this general rule, an exception occurs where an action *ex delicto* is brought against several persons in respect of their ownership in land, for then they are liable jointly, and not jointly and severally."¹¹⁹

EXTENT OF LIABILITY.

116. Each partner is personally liable for the entire amount of all partnership obligations, except—

Exception—In some states, by statute, partnership associations may be formed in which the liability of some or all of the partners is limited.

Each individual partner is liable to creditors of the firm for the whole amount of every debt due therefrom, without reference to the proportion of his interest, or to the nature of

¹¹⁵ *Williams v. Muthersbaugh*, 29 Kan. 730; *Hall v. Cook*, 69 Ala. 87; *Putnam v. Ross*, 55 Mo. 116.

¹¹⁶ *Coates v. Preston*, 105 Ill. 470; *Hyde v. Casey-Grimshaw Marble Co.*, 82 Ill. App. 83; *Currey v. Warrington*, 5 Har. (Del.) 147.

¹¹⁷ *Linton v. Hurley*, 14 Gray (Mass.) 191; *Roberts v. Johnson*, 58 N. Y. 613; *Wood v. Luscomb*, 23 Wis. 287; *Howe v. Shaw*, 56 Me. 291; *Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. 93, *Mechem's Cases*, 335; *Stockton v. Frey*, 4 Gill (Md.) 406; *In re Blackford*, 35 App. Div. 330, 54 N. Y. Supp. 972; *Walker v. Anglo-American Mortgage & Trust Co.*, 72 Hun, 334, 25 N. Y. Supp. 432.

¹¹⁸ *Blyth v. Fladgate* [1891], 1 Ch. 353; *In re Jordan*, 2 Fed. 319.

¹¹⁹ *Lindl. Partn.* p. 198, citing 1 Wm. Saund. 291f, 291g.

the stipulation between him and his associates.¹²⁰ This rule is equally applicable to obligations arising out of torts.¹²¹ "The law, ignoring the firm as anything distinct from the members composing it, treats the debts and engagements of the firm as the debts and engagements of the partners, and holds each partner liable for them accordingly."¹²² This liability is, however, only a liability *in solido* upon the judgment, and one partner cannot ordinarily be sued alone upon a firm debt.^{122a}

Execution against Individual Property.

In the absence of statutory provision to the contrary, "if judgment is obtained against the firm for a debt owing by it, the judgment creditor is under no obligation to levy execution against the property of the firm before having recourse to the separate property of the partners nor is he under any obligation to levy execution against all of the partners ratably; but he may select any one or more of them, and levy execution upon him or them until the judgment is satisfied, leaving all questions of contribution to be settled afterwards between the partners themselves."¹²³

¹²⁰ *Ellison v. Stuart*, 2 Pen. (Del.) 179, 43 Atl. 837; *Brooke v. Washington*, 8 Grat. (Va.) 248, 56 Am. Dec. 142; *Judd Oil Co. v. Hubbell*, 76 N. Y. 543, *Mechem's Cases*, 341. In Louisiana, it is only in the case of commercial partnerships that each partner is subject to this entire liability. See *Gumbel v. Abrams*, 20 La. Ann. 569; *Payne v. James*, 36 La. Ann. 476.

¹²¹ *Loomis v. Barker*, 69 Ill. 360.

¹²² *Lindl. Partn.* p. 200.

^{122a} See post, § 136 et seq.

¹²³ *Stout v. Baker*, 32 Kan. 113, 4 Pac. 141; *Saunders v. Reilly*, 105 N. Y. 12, 12 N. E. 170, *Burdick's Cases*, 277; *Leinkauff v. Munter*, 76 Ala. 194; *Clayton v. May*, 68 Ga. 27; *Hamsmith v. Espy*, 13 Iowa, 439, *Burdick's Cases*, 376; *Stevens v. Perry*, 113 Mass. 380, *Burdick's Cases*, 377. Compare *Jaffray v. Jennings*, 101 Mich. 515, 60 N. W. 52, *Burdick's Cases*, 378.

Stipulations Limiting Liability.

In the absence of statute, the only effectual way of limiting the liability of a partner is to stipulate with each creditor that he shall be paid only out of the funds of the partnership, and that he shall not be entitled to require the individual partners to pay more than a certain amount.¹²⁴ Certainly a limitation contained in the articles of association would not bind a creditor who had no notice of such limitation at the time the indebtedness was incurred,¹²⁵ and it is at least doubtful whether a stipulation between partners limiting the liability of one of them for losses would affect even a creditor with notice, for such a stipulation is quite consistent with an intention that all of the partners should be primarily bound to third persons, but that, as between themselves some of them should indemnify the others in case of loss.¹²⁶

Limited Partnership and Joint-Stock Companies.

In several jurisdictions, statutes exist under which a species of partnership, known as a "limited partnership," may be formed, in which the liability of some of the members is limited to a definite sum. So, also, the liability of members of joint-stock companies is sometimes limited by statute. These subjects will be treated separately in subsequent chapters.¹²⁷

COMMENCEMENT OF LIABILITY.

117. A partner is not liable for the debts and obligations incurred by his copartners before the partnership between him and them was formed, except—

Exception—Where he expressly assumes liability.

¹²⁴ Lindl. Partn. p. 201.

¹²⁵ *Ellison v. Stuart*, 2 Pen. (Del.) 179, 48 Atl. 837.

¹²⁶ See *Everitt v. Chapman*, 6 Conn. 347.

¹²⁷ See post, cc. 12 and 13.

The agency of a partner, to bind his firm and his copartners, commences only with the commencement of the partnership. A person, therefore, who enters into partnership with another, or joins an existing firm, does not thereby become liable to the creditors of his partner or of the firm for anything done before he became a partner.¹²⁸ The point of time when a partnership begins must be determined upon principles already discussed.¹²⁹ An incoming partner will, however, be liable for new debts arising after he has joined the firm, under a continuing contract entered into with the firm before that time.¹³⁰ So, where there is a partnership in the performance of a single contract, a new member cannot identify himself with the firm, and buy into the partnership contract, without making himself liable for the obligations of that contract.¹³¹

Assumption of Debts.

Where an incoming partner or the new firm formed by his entrance, agrees with the old firm to assume some or all of its debts, the cases are in considerable conflict as to whether or not the creditors of the old firm acquire any rights under the

¹²⁸ *Saville v. Robert*, 4 Term R. 720; *Gabriel v. Evill*, 9 Mees. & W. 297; *Heap v. Dobson*, 15 C. B. (N. S.) 460; *Valentine v. Hickie*, 39 Ohio St. 19; *Heckert v. Fegely*, 6 Watts & S. (Pa.) 139; *Wilson v. Whitehead*, 10 Mees. & W. 503; *Corner v. Mackey*, 147 N. Y. 574, 42 N. E. 29; *Sizer v. Ray*, 87 N. Y. 220; *Guild v. Belcher*, 119 Mass. 257; *Hoyt v. Hasse*, 80 Ill. App. 187; *Penn v. Fogler*, 182 Ill. 76, 55 N. E. 192; *Salter v. Edward Hines Lumber Co.*, 77 Ill. App. 97; *Nix v. First Nat. Bank*, 23 Colo. 511, 48 Pac. 522; *Rohlfing v. Carper*, 53 Kan. 251, 36 Pac. 336; *Wolff v. Madden*, 6 Wash. 514, 33 Pac. 975; *Bank of Scott City v. Sandusky*, 51 Mo. App. 398.

¹²⁹ See chapter 1, and specially section 24.

¹³⁰ *Dyke v. Brewer*, 2 Car. & K. 828. An incoming partner is not liable on a written agreement of employment for more than a year, made before his entry into the firm, and signed in the firm name only. *Hughes v. Gross*, 166 Mass. 61, 43 N. E. 1031, *Burdick's Cases*, 296.

¹³¹ *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484.

agreement. Of course, as between the parties to the contract, it is binding, and may be enforced.

In some jurisdictions, the doctrine prevails that a person not a party to a contract cannot sue upon it, although it was made for his benefit. In such jurisdictions, an assumption of the debts of the old firm by the new firm gives the creditor no rights against the new firm.¹³² Under this doctrine, to give the creditors any right in the premises, there must be some agreement to that effect between the new partners and creditors.¹³³ The court appears to imply such an agreement somewhat readily if there is any evidence to support it.¹³⁴

In other jurisdictions the doctrine prevails that a person for whose benefit a contract has been made may sue upon it, though not himself a party thereto. Under this doctrine, a creditor of the old firm who can show that his debt was one of those included in the assumption of debts may recover against the new firm.¹³⁵ But when the agreement assuming debts is in such form that no particular creditor can show that it was made for his benefit, as where the agreement was simply to pay a certain proportion of the debts of the old firm, without specifying any particular debts, no creditor can sue upon it, but it must be enforced, if at all, by the parties with whom it was made.¹³⁶

¹³² *Lindl. Partn.* p. 208; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 *Lea* (Tenn.) 358; *Parmalee v. Wiggenhorn*, 6 *Neb.* 322; *Vere v. Ashby*, 10 *Barn. & C.* 288.

¹³³ *Rolfe v. Flower*, *L. R.* 1 *P. C.* 27.

¹³⁴ *Rolfe v. Flower*, *L. R.* 1 *P. C.* 27; *Ex parte Jackson*, 1 *Ves. Jr.* 131, 1 *Rev. R.* 91; *Ex parte Williams*, *Buck*, 13; *Jones v. Davies*, 60 *Kan.* 309, 56 *Pac.* 484. A promise to assume liability may be inferred from the conduct of an incoming partner. *Salter v. Edward Hines Lumber Co.*, 77 *Ill. App.* 97.

¹³⁵ *Arnold v. Nichols*, 64 *N. Y.* 117.

¹³⁶ *Wheat v. Rice*, 97 *N. Y.* 296; *Serviss v. McDonnell*, 107 *N. Y.* 260, 14 *N. E.* 314.

The assumption of indebtedness by an incoming partner is not within the statute of frauds and need not be in writing.^{186a}

TERMINATION OF LIABILITY.

118. In order to determine the events which put an end to a partner's liability to creditors, it is necessary to distinguish his liability for the future from his liability for the past.

SAME—FOR FUTURE ACTS.

119. A partner's liability for the acts of his copartners ceases upon his retirement from the firm, or its dissolution, except—

Exception—In most cases, notice of retirement is necessary to terminate liability.

As a general rule, a partner is not liable for the acts of his former partners after the dissolution of his firm, or his retirement from it, and due notification, when necessary, of the fact,¹³⁷ for the agency of the partners for each other is thereby terminated. If, however, the retiring partner holds himself out as being still a partner, or allows others to do so, he is liable upon principles already explained.¹³⁸ So, notwithstanding a dissolution, all the partners remain liable for acts of their former copartner necessary to complete transactions

^{186a} *Barlett v. Smith* (Neb), 98 N. W. 687.

¹³⁷ *Ex parte Central Bank of London* [1892], 2 Q. B. 633; *Abel v. Sutton*, 3 Esp. 108, 6 Rev. R. 818; *Minnit v. Whinery*, 5 Bro. P. C. 489; *Monroe v. Conner*, 15 Me. 178; *Yeager v. Wallace*, 57 Pa. 365; *Askew v. Silman*, 95 Ga. 678, 22 S. E. 573; *Burdick's Cases*, 106; *Goodspeed v. South Bend Chilled Plow Co.*, 45 Mich. 237, 7 N. W. 510; *Matteson v. Nathanson*, 38 Mich. 377.

¹³⁸ See ante, §§ 35-37. See, also, *Speer v. Bishop*, 24 Ohio St. 598; *Richards v. Hunt*, 65 Ga. 342; *Ellis' Adm'r v. Bronson*, 40 Ill. 455.

begun, but not finished at the time of the dissolution.¹³⁹ Any partner may give notice of the dissolution of the firm, or of his retirement therefrom, and may require his copartners to concur, for that purpose, in all necessary or proper acts which cannot be done without their concurrence.¹⁴⁰

SAME—NOTICE OF DISSOLUTION.

120. Notice of dissolution or retirement is necessary in all cases to terminate liability for future acts of the other partners, except—

Exceptions—Notice is not necessary to terminate liability in the following cases, viz.:

- (a) Where the dissolution was by operation of law.
- (b) In the case of unknown, dormant and secret partners.
- (c) In the case of torts.

121. Where notice is necessary, former customers of the firm are entitled to actual notice, but notice by publication is sufficient as to all others.

Speaking generally, a person who deals with an agent, and knows that he has authority to act for his principal, is entitled to assume the continuance of that authority until he has notice of its revocation, unless such revocation is caused by the

¹³⁹ *Thursby v. Lidgerwood*, 69 N. Y. 198; *Rust v. Chisolm*, 57 Md. 376; *Merrill v. Blanchard*, 7 App. Div. (N. Y.) 167. Compare *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *Moore v. Duckett*, 91 Ga. 752, 17 S. E. 1037. In *Court v. Berlin* [1897], 2 Q. B. 396, a solicitor, retained by a firm to bring an action for the recovery of a partnership debt, recovered from retired partners costs incurred after their retirement, for the liability was really incurred before their retirement, namely, when the solicitor was retained. Compare the converse case, *Dyke v. Brewer*, 2 Car. & K. 323.

¹⁴⁰ English Partnership Act 1890, § 37; *Hendry v. Turner*, 32 Ch. Div. 355; *Troughton v. Hunter*, 18 Beav. 470.

death of the principal.¹⁴¹ Consequently, with the exceptions hereafter mentioned, a partner, in order to terminate his liability for the future acts of his partners, must not only cease to be a partner, but must also give due notice of this fact.¹⁴² If a secret dissolution were binding upon third persons, the partners would be in a position to defraud them, and no one could safely deal with a partnership in the way business is usually carried on.

Dissolution by Operation of Law.

Where a partnership is dissolved by operation of law, no notice of dissolution is necessary to terminate liability for future acts.¹⁴³ The reason assigned for this rule is that dissolution by operation of law is of a public and not of a private nature, and is presumed to be taken notice of by every one.¹⁴⁴ As will be seen in the following chapter, a partnership is dissolved by operation of law upon the death or bankruptcy of a partner, or upon the breaking out of war between the countries in which the partners respectively reside.

Dormant and Secret Partners.

Unknown, dormant and secret partners need not give notice of retirement in order to terminate their liability.¹⁴⁵

¹⁴¹ *Blades v. Free*, 9 Barn. & C. 167.

¹⁴² *Arnold v. Hart*, 176 Ill. 442, 52 N. E. 936; *Morrill v. Bissell*, 99 Mich. 409, 58 N. W. 324; *Austin v. Holland*, 69 N. Y. 571, *Mechem's Cases*, 370; *Howell v. Adams*, 68 N. Y. 314; *Woodruff v. King*, 47 Wis. 261, 2 N. W. 252; *Southern v. Grim*, 67 Ill. 106; *Parker v. Canfield*, 37 Conn. 250, 9 Am. Rep. 317; *Burgan v. Lyell*, 2 Mich. 102, *Burdick's Cases*, 312, 55 Am. Rep. 53; *Clement v. Clement*, 69 Wis. 599, 35 N. W. 17, 2 Am. St. Rep. 760.

¹⁴³ *Bank of New Orleans v. Matthews*, 49 N. Y. 12; *Lyon v. Johnson*, 28 Conn. 1; *Dickinson v. Dickinson*, 25 Grat. (Va.) 321; *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

¹⁴⁴ *Bates*, Partn. § 610; *Mechem*, Partn. § 260; *Eustis v. Bolles*, 146 Mass. 413, 16 N. E. 286.

¹⁴⁵ *Nussbaumer v. Becker*, 87 Ill. 281; *Pitkin v. Benfer*, 50 Kan.

When a dormant partner ceases to be a member of the firm, the real authority of his copartners to bind him is thereby withdrawn, and as *ex hypothesi* no one knows of the authority, no one is entitled to rely upon its continuance.¹⁴⁶ If, however, a person not generally known to have been a partner is known to certain individuals to have been a partner, he is not a dormant partner as to them, and notice of his retirement must be given to them.¹⁴⁷

Torts.

It would seem that a failure to give notice of retirement will not render the retiring partner liable for torts committed subsequently to his retirement by his late copartners or their agents, as in such case there is no reliance upon his continued presence in the firm.¹⁴⁸

108, 31 Pac. 695, Mechem's Cases, 313; Elmira Iron, etc. Co. v. Harris, 124 N. Y. 280, 26 N. E. 541, Burdick's Cases, 398; Howell v. Adams, 68 N. Y. 314; Warren v. Ball, 37 Ill. 81; Vaccaro v. Toof, 9 Heisk. (Tenn.) 194; Gilchrist v. Brande, 58 Wis. 184, 15 N. W. 817; Gorman v. Davis & Gregory Co., 118 N. C. 370, 24 S. E. 770.

¹⁴⁶ Carter v. Whalley, 1 Barn. & Adol. 14; Heath v. Sansom, 4 Barn. & Adol. 172. If one is not in fact a dormant partner, the mere fact that he was not known to be a partner does not relieve him of the necessity of giving notice of retirement. Bouker Contracting Co. v. Scribner, 52 App. Div. 505, 65 N. Y. Supp. 444.

¹⁴⁷ Farrar v. Deffinne, 1 Car. & K. 580; Nussbaumer v. Becker, 87 Ill. 281; Ellis' Adm'rs v. Bronson, 40 Ill. 455; Kelley v. Hurlburt, 5 Cow. (N. Y.) 534; Southwick v. McGovern, 28 Iowa, 533; Benjamin v. Covert, 47 Wis. 375, 2 N. W. 625; Brown v. Foster, 41 S. C. 118, 19 S. E. 299.

¹⁴⁸ Shapard v. Haynes, 104 Fed. 449, 52 L. R. A. 675; Lindl. Partn. p. 215. In Stables v. Eley, 1 Car. & P. 614, a retired partner was held liable in tort upon the ground of holding out; but this case has been pronounced unsound in principle by eminent authority. See Lindl. Partn. p. 315, note; Pollock, Partn. (3d Ed.) p. 25. See, also, ante, §§ 35-37. A quasi-partner is liable for torts founded upon contract. Sherrod v. Langdon, 21 Iowa, 518, Burdick's Cases, 112; Maxwell v. Gibbs, 32 Iowa, 32.

Sufficiency of Notice.

All persons who have had dealings with the firm before its dissolution are entitled to have actual notice. Mere publication in a newspaper is not sufficient. But if, in any case, actual notice can be shown, it is immaterial how it is given.¹⁴⁹

As to persons who have had no dealings with the firm prior to its dissolution, fair notice in any public and notorious manner is sufficient. Notice by publication in a newspaper circulated in the locality in which the business of the partnership has been conducted is the usual and best method of giving such general notice.¹⁵⁰

¹⁴⁹ *Graham v. Hope, Peake*, 208, 3 Rev. R. 671; *Rooth v. Quin*, 7 Price, 193, 21 Rev. R. 744; *Barfoot v. Goodall*, 3 Camp. 147; *Bouker Contracting Co. v. Scribner*, 52 App. Div. 505, 65 N. Y. Supp. 444; *Austin v. Holland*, 69 N. Y. 571, *Mechem's Cases*, 370; *Howell v. Adams*, 68 N. Y. 314; *National Shoe and Leather Bank v. Herz*, 89 N. Y. 629; *Elmira Iron & Steel Rolling-Mill Co. v. Harris*, 124 N. Y. 280, 26 N. E. 541, *Burdick's Cases*, 398; *Meyer v. Krohn*, 144 Ill. 574, 3 N. E. 495; *Robinson v. Floyd*, 159 Pa. 165, 28 Atl. 258; *Haynes v. Carter*, 12 Heisk. (Tenn.) 7; *Potter v. Tolbert*, 113 Mich. 486, 71 N. W. 849; *Gathright v. Burke*, 101 Ind. 590; *Rose v. Coffield*, 53 Md. 18; *Vernon v. Manhattan Co.*, 22 Wend. (N. Y.) 183; *Clapp v. Rogers*, 12 N. Y. 283; *City Bank v. McCheaney*, 20 N. Y. 240. Declarations of the remaining partner to neighbors are no evidence of actual notice of dissolution to a creditor living 500 miles away. *Gage v. Rogers*, 51 Mo. App. 428. Actual notice of the dissolution may be inferred by the jury from the remaining partner's testimony that at once, after the dissolution, she notified the commercial agencies, which distributed the information by its daily slips to subscribers, among whom was the creditor, and that such slips were daily examined by the latter's credit man. *Gage v. Rogers*, 51 Mo. App. 428. Notice to plaintiff's traveling salesman that defendant had withdrawn from the firm to which the salesman sold goods for plaintiff was notice to plaintiff, so as to relieve defendant from liability for the price of the goods sold. *Ach v. Barnes*, 21 Ky. L. R. 893, 53 S. W. 293; *Cowan v. Roberts*, 133 N. C. 629, 45 S. E. 954. A statement to a clerk by a person buying for a firm that he thought one of the partners had sold out is not notice to the employer of the clerk. *Brown v. Foster*, 41 S. C. 118, 19 S. E. 299. Notice to a bookkeeper is ordinarily insufficient. *Cowan v. Roberts*, *supra*.

¹⁵⁰ *Askew v. Silman*, 95 Ga. 678, 22 S. E. 573, *Burdick's Cases*, 106;

SAME—FOR PAST ACTS.

122. The liability of partners for past obligations of the firm continues after retirement or dissolution, and until such obligations are discharged by—

- (a) Payment.
- (b) Release.
- (c) Novation.
- (d) Merger by judgment.
- (e) Bankruptcy.
- (f) Limitation.

With regard to a partner's liability for past acts, a partner who retires from a firm does not thereby cease to be liable for the partnership debts and obligations incurred before his retirement. Nor will death release the estate of a deceased partner from liabilities incurred during his life. It is necessary, therefore, to consider shortly the more important ways by which a partner or the estate of a deceased partner may be freed from such liability.

Payment.

An obligation, whether it be joint or joint and several, is discharged if performed by any one of the persons obliged;¹⁵¹ therefore payment of partnership debt by any one partner will discharge all the rest,¹⁵² unless, indeed, the partner who pays the debt pays it out of his own moneys, and in such a way as to show his intention to keep the debt alive as against the firm,¹⁵³ though it would seem that, even in that case, the

Lovejoy v. Spafford, 93 U. S. 430; Ellison v. Sexton, 105 N. C. 356, 11 S. E. 180.

¹⁵¹ See Beaumont v. Greathead, 2 C. B. 494.

¹⁵² LePage v. McCrea, 1 Wend. (N. Y.) 164; Booth v. Farmers' & Mechanics' Nat. Bank, 74 N. Y. 228; Hinton v. Odenheimer, 4 Jones Eq. (N. C.) 406; Hogan v. Reynolds, 21 Ala. 56.

¹⁵³ Lindl. Partn. p. 225 et seq; McIntyre v. Miller, 13 Mees. & W. 725; Sells v. Hubbell's Adm'rs, 2 Johns. Ch. (N. Y.) 394.

liability would be extinguished, and the payment would constitute a mere item in the partnership account.¹⁵⁴

In considering discharge by payment, attention must be paid to the general rules relating to the appropriation of payments,¹⁵⁵ and especially to the rule in *Clayton's Case*,¹⁵⁶ which is that, where there is one single open current account¹⁵⁷ between two parties, every payment which cannot be shown to have been made in discharge of some particular item is imputed to the earliest item standing, to the debt of the payer at the time of payment. The application of this rule will discharge from liability the estate of a deceased partner,¹⁵⁸ and a retired partner, whether known¹⁵⁹ or dormant.¹⁶⁰ This rule, like the other rules relating to the appropriation of payments, is not a rigid rule of law, but depends upon the intention of the parties, expressed, implied or

¹⁵⁴ *Bates*, Partn. § 531, citing *Bartlett v. McRae*, 4 Ala. 688.

¹⁵⁵ As to the general rule for the application of payments, see *Bates*, Partn. § 489; *Lindl. Partn.* p. 226. Partnership cases on application of payments. *Miles v. Ogden*, 54 Wis. 573, 12 N. W. 81; *Wittkowsky v. Ried*, 82 N. C. 116; *Brown's Ex'rs v. Brabham*, 3 Ohio, 275; *Logan v. Mason*, 6 Watts & S. (Pa.) 9; *Youmans v. Heartt*, 34 Mich. 397.

¹⁵⁶ General authorities on rule in *Clayton's Case*; *Clayton's Case*, 1 Merivale, 572, 15 Rev. R. 161; *Morgan v. Tarbell*, 28 Vt. 498; *Starr v. Case*, 59 Iowa, 491; *Jones v. Maund*, 3 Younge & C. 347; *Taylor v. Post*, 30 Hun (N. Y.) 446; *Simson v. Ingham*, 2 Barn. & C. 65; *Burns v. Pillsbury*, 17 N. H. 66; *Botsford v. Kleinhans*, 29 Mich. 332; *Hooper v. Keay*, 1 Q. B. Div. 178; *Brooke v. Enderby*, 2 Brod. & B. 70, 22 Rev. R. 653; *Newmarch v. Clay*, 14 East, 329; *Beale v. Caddick*, 2 Hurl. & N. 326, *Burland v. Nash*, 2 Fost. & F. 687.

¹⁵⁷ *Cory Bros. & Co. v. Owners of the Mecca* [1897], App. Cas. 286.

¹⁵⁸ *Clayton's Case*, 1 Merivale, 572, 15 Rev. R. 161.

¹⁵⁹ *Hooper v. Keay*, 1 Q. B. Div. 178; *Allcott v. Strong*, 9 Cush. (Mass.) 323; *Baker v. Stackpole*, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508.

¹⁶⁰ *Brooke v. Enderby*, 2 Brod. & B. 70, 22 Rev. R. 653; *Newmarch v. Clay*, 14 East, 239.

presumed,¹⁶¹ consequently it will not be applied against a creditor in respect of a fraud committed on him, of which he is ignorant.¹⁶²

A payment out of partnership funds must be applied to the partnership debt, and not to the individual debt of the partner making the payment.¹⁶³

Release.

When several persons are bound jointly or jointly and severally, a release of one is a release of them all; hence, a release of one partner from a partnership liability, whether it arises from contract or tort, discharges all the others.¹⁶⁴ But a covenant not to sue one partner has not this effect,¹⁶⁵ and a release so drawn as to show that it is intended to inure only for the benefit of the releasee personally is equivalent to a covenant not to sue.¹⁶⁶ If, however, the debt be in fact released, any attempt to reserve a right of action against other

¹⁶¹ *Cory Bros. & Co. v. Owners of the Mecca* [1897], App. Cas. 286; *In re Hallett's Estate*, 13 Ch. Div. 696.

¹⁶² *Clayton's Case*, 1 Merivale, 572, 15 Rev. R. 161; *Lacey v. Hill*, 4 Ch. Div. 537, affirmed sub nom. *Read v. Bailey*, 3 App. Cas. 94. See, too, *Wickham v. Wickham*, 2 Kay & J. 478.

¹⁶³ *Bates*, Partn. § 493.

¹⁶⁴ *Bower v. Swadlin*, 1 Atk. 294; *Cheetham v. Ward*, 1 Bos. & P. 630, 4 Rev. R. 741; *Duck v. Mayeu* [1892], 2 Q. B. 511; *Elliott v. Holbrook*, 33 Ala. 659; *Le Page v. McCrea*, 1 Wend. (N. Y.) 164; *Rice v. Woods*, 21 Pick. (Mass.) 30. "Where a judgment against a firm and its individual members was released as to one member, the judgment creditor had thereafter no right to have a receiver of the partnership property appointed in supplementary proceedings." *Hunter v. Hunter*, 73 N. Y. Supp. 886.

¹⁶⁵ *Hutton v. Eyre*, 6 Taunt. 289, 16 Rev. R. 619; *Duck v. Mayeu* [1892], 2 Q. B. 511; *Bates v. Wills Point Bank*, 11 Tex. Civ. App. 73, 32 S. W. 339; *Couch v. Mills*, 21 Wend. (N. Y.) 424. And see *Faneuil Hall Nat. Bank v. Meloon*, 183 Mass. 66, 66 N. E. 410, 97 Am. St. Rep. 416.

¹⁶⁶ *Solly v. Forbes*, 2 Broad. & B. 38, 22 Rev. R. 641; *Price v. Barker*, 4 El. & Bl. 760; *Duck v. Mayeu* [1892], 2 Q. B. 511; *Pearce v. Wilkins*, 2 N. Y. 469.

parties in respect of it will be futile.¹⁶⁷ By statute in some states a release of one partner by compromise does not operate as a release of all.¹⁶⁸

Novation.

Where a partner retires, or the firm is dissolved and succeeded by a new firm, the retiring partner, or the members of the old firm, may be relieved of its liabilities by an agreement with the remaining partners or the new firm, by which the latter assume such liabilities, provided the creditor assents to such agreement, discharges his former debtors, and accepts the new firm as his debtors. Such an agreement is called a "novation," and the mutual agreements of the parties thereto constitute a sufficient consideration to support it. The agreement of the new firm to pay the debt constitutes a sufficient consideration for the promise of the creditor to discharge his former debtors, and *vice versa*, though there have been distinctions drawn between cases where a new partner has been introduced into the firm, and where a partner has simply retired.¹⁶⁹ The difficulty in applying this rule is one of fact, whether such an agreement as is here mentioned has or has not been entered into.¹⁷⁰ The mere retirement of a

¹⁶⁷ *Commercial Bank v. Jones* [1893], App. Cas. 313.

¹⁶⁸ See *Wheeling Corrugating Co. v. Veach*, 7 Ohio Dec. 521.

¹⁶⁹ See, generally, as to consideration, the following cases: *Early v. Burt*, 68 Iowa, 716, 28 N. W. 35; *Walstrom v. Hopkins*, 103 Pa. 118; *Backus v. Fobes*, 20 N. Y. 204; *Eagle Mfg. Co. v. Jennings*, 29 Kan. 657; *Lodge v. Dicus*, 3 Barn. & Ald. 611; *David v. Ellice*, 5 Barn. & C. 196; *Thompson v. Percival*, 5 Barn & Adol. 925; *Lyth v. Ault*, 7 Exch. 669, *Burdick's Cases*, 385; *Wild v. Dean*, 3 Allen (Mass.) 579; *York v. Orton*, 65 Wis. 6, 26 N. W. 166; *Clark v. Billings*, 59 Ind. 508.

¹⁷⁰ *Bedford v. Deakin*, 2 Barn. & Ald. 210; *Jacomb v. Harwood*, 2 Ves. Sr. 265; *Kirwan v. Kirwan*, 2 Crompt. & M. 617, *Burdick's Cases*, 384; *Gough v. Davies*, 4 Price, 200; *Blew v. Wyatt*, 5 Car. & P. 397; *Robinson v. Wilkinson*, 3 Price, 538, *Burdick's Cases*, 396, 18 Rev. R. 659.

partner raises no presumption in favor of such an agreement,¹⁷¹ nor does mere silence of the creditor amount to an assent.¹⁷² Of course, no agreement between the partners can discharge their liability to a creditor without or against his consent.^{172a} But though, in such a case, all the partners are primarily liable to a creditor, as between themselves, the agreement assuming debts creates the relation of principal and surety, and the party in whose favor such an agreement is made has all the rights of a surety. If he pays the debt, he is subrogated to the rights of the creditor, and if, with notice of the agreement, the creditor extends the time of payment to the other partners, he is discharged.¹⁷³

Merger by Judgment.

Where a debt is reduced to judgment, it is merged in the higher security, and can no longer be made the subject of a separate suit. Accordingly, if a partnership creditor obtains judgment upon his claim, he loses his remedy against the other partners, even if they were not known to him.¹⁷⁴ This

¹⁷¹ *Lyth v. Ault*, 7 Exch. 669, *Burdick's Cases*, 385; *Benson v. Hadfield*, 4 Hare, 37.

¹⁷² *Heath v. Percival*, 1 P. Wms. 682; *Norman v. Jackson Fertilizer Co.*, 79 Miss. 747, 31 So. 419.

^{172a} "A retiring partner remains liable to all the existing debts of the firm to the same extent as if he had not retired and hence an agreement between him and the remaining partner that the remaining partner will assume and pay all existing debts of the firm, while valid as between themselves, cannot change their relation to the creditors unless the creditors become parties thereto." *Grotte v. Well*, 62 Neb. 478, 87 N. W. 173.

¹⁷³ *McLaughlin v. Bleber*, 56 N. Y. Supp. 490; *Smith v. Shelden*, 35 Mich. 42; *Laylin v. Knox*, 41 Mich. 40; *Chandler v. Higgins*, 109 Ill. 602; *Shamburg v. Abbott*, 112 Pa. 6, 4 Atl. 518; *Palmer v. Purdy*, 83 N. Y. 144; *Savage v. Putnam*, 32 N. Y. 501; *Sydnam v. Cannon*, 1 *Houst. (Del.)* 431; *Conwell v. McCowan*, 81 Ill. 285.

¹⁷⁴ *Lindl. Partn.* p. 255; *Kendall v. Hamilton*, 4 App. Cas. 504, *Burdick's Cases*, 488; *King v. Hoare*, 13 Mees. & W. 404; *Lingenfelser*

rule has been changed by statute in some states. It has no application to the case of a deceased partner. The creditor may recover judgment against the survivors and also prove against the estate of the deceased.¹⁷⁵ Proof in bankruptcy against one partner will not so merge the debt as to prevent recourse on the others.¹⁷⁶

Bankruptcy.

The individual bankruptcy of a partner and his subsequent discharge will release him from his liabilities as a partner,¹⁷⁷ but the bankruptcy and discharge of his copartners only will not have this effect, and it has been held that a separate discharge will not relieve a partner of liability for firm debts unless there were no partnership assets at the time of the discharge.¹⁷⁸

Limitations.

A partner's liability to be sued upon partnership obligation may, of course, be barred by the statute of limitations.

v. Simon, 49 Ind. 82; Olmstead v. Webster, 8 N. Y. 413; Smith v. Black, 9 Serg. & R. (Pa.) 142; Scarf v. Jardine, 7 App. Cas. 345.

¹⁷⁵ Lindl. Partn. p. 257.

¹⁷⁶ Keay v. Fenwick, 1 C. P. Div. 745; Whitwell v. Perrin, 4 C. B. (N. S.) 412.

¹⁷⁷ Ex parte Hammond, L. R. 16 Eq. 614; Bovill v. Wood, 2 Maule & S. 23; In re Brick, 4 Fed. 804; In re Gay, 98 Fed. 870; Tucker v. Oxley, 5 Cranch (U. S.) 34; In re Stevens, 1 Sawy. 397, Fed. Cas. No. 13,393; West Philadelphia Bank v. Gerry, 106 N. Y. 467, 13 N. E. 453; Curtis v. Woodward, 58 Wis. 499, 17 N. W. 328, 46 Am. Rep. 647; Hawley v. Campbell, 62 Cal. 442. But compare Perkins v. Fisher, 80 Ky. 11; Glenn v. Arnold, 56 Cal. 631; In re Noonan, 3 Biss. 491, Fed. Cas. No. 10,292.

¹⁷⁸ Corey v. Perry, 67 Me. 140, Burdick's Cases, 466, 24 Am. Rep. 15; Crompton v. Conkling, 9 Ben. 225, Fed. Cas. No. 3,407.

APPLICATION OF ASSETS TO LIABILITIES.

123. This subject will be treated under the following heads:

(a) Application by voluntary act of partners.

ⁱ(b) Application under direction of court.

SAME—APPLICATION BY PARTNERS.

124. The partners may dispose of their firm and individual assets in any way they see fit, provided—

Proviso—They must act in good faith, and not in fraud of creditors.

Partners own the firm property just as an individual owns his own individual property. They may, accordingly, by common agreement, make any disposition of it that an individual could make of his property.¹⁷⁹ This right of disposition is, of course, subject to the general rule of law, not pecu-

¹⁷⁹ *Allen v. Center Valley Co.*, 21 Conn. 130, 54 Am. Dec. 333; *Hargadine-McKittrick, Dry Goods Co. v. Belt*, 74 Ill. App. 581; *Fisher v. Syfers*, 109 Ind. 514, 10 N. E. 306; *Hawk Eye Woolen Mills v. Conklin*, 26 Iowa, 422; *Reyburn v. Mitchell*, 106 Mo. 365, 16 S. W. 592; *Sexton v. Anderson*, 95 Mo. 373, 8 S. W. 564; *Fitzgerald v. Christl*, 20 N. J. Eq. 90; *Citizens' Bank v. Williams*, 128 N. Y. 77, 28 N. E. 33; *Robb v. Stevens*, Clarke Ch. (N. Y.) 191; *Darby v. Gilligan*, 33 W. Va. 246, 10 S. E. 400. "The partnership creditors, except when they are given the benefit of the partner's equity, have of themselves no other claim than any creditor has on his debtor's property. * * * The partners have jointly the same right of absolute disposition of their joint property that any individual has. They may sell it, pledge it, convert it into other forms, divide it up among themselves, devote it to the payment of debts or part of the debts, or exercise other ownership over it, subject only to each other's rights, and to the operation of statutes forbidding voluntary conveyances to hinder and defraud creditors." *Bates, Partn.* § 824.

liar to partnership, that no one can make a valid voluntary conveyance in fraud of his creditors.¹⁸⁰

All the partners may, by their joint act, dispose of partnership property in liquidation and payment of a debt owing by an individual member of the firm¹⁸¹ or for a debt for which they are jointly liable outside of the business of the firm.¹⁸² The trend of modern authority is to the effect that the fact that the firm is insolvent, or that such application of its assets to individual debts will render it insolvent, does not deprive the partners of their right to make such application, provided, always, as already stated, the partners act in good faith, and not in fraud of creditors,¹⁸³ and such a tendency seems in harmony with the modern authorities repudiating the so-called trust fund doctrine as applied to corporations.

¹⁸⁰ *Purple v. Farrington*, 119 Ind. 164, 21 N. E. 543; *Sexton v. Anderson*, 95 Mo. 381; *Robinson v. Allen*, 85 Va. 721; *Bonwit v. Heyman*, 43 Neb. 537, 61 N. W. 716.

¹⁸¹ *Fisher v. Syfers*, 109 Ind. 514, 10 N. E. 306; *Assignment of Stewart*, 62 Iowa, 614, 17 N. W. 897; *Woodmansie v. Holcomb*, 34 Kan. 35, 7 Pac. 603; *Schmidlapp v. Currie*, 55 Miss. 597; *Sexton v. Anderson*, 95 Mo. 373, 8 S. W. 564; *Bernheimer v. Rindskopf*, 116 N. Y. 428, 22 N. E. 1074; *Snodgrass' Appeal*, 13 Pa. 471; *Hage v. Campbell*, 78 Wis. 572, 47 N. W. 179, *Mechem's Cases*, 453; *Case v. Beauregard*, 99 U. S. 119, *Mechem's Cases*, 440, *Ames' Cas.* 246.

¹⁸² *Saunders v. Reilly*, 105 N. Y. 12, 12 N. E. 170, *Burdick's Cases*, 277; *Rouss v. Wallace*, 10 Colo. App. 93; *Hoare v. Oriental Bank Corp.*, 2 App. Cas. 589; *Citizens' Nat. Bank v. Wehrle*, 9 Ohio Dec. 330.

¹⁸³ *Singer v. Carpenter*, 125 Ill. 117, 17 N. E. 761; *Hargadine-McKittrick Dry Goods Co. v. Belt*, 74 Ill. App. 581; *Purple v. Farrington*, 119 Ind. 164, 21 N. E. 543; *Johnston v. Robuck*, 104 Iowa, 523, 73 N. W. 1062; *Hanover Nat. Bank v. Klein*, 64 Miss. 141, 8 So. 208; *Goddard-Peck Grocery Co. v. McCune*, 122 Mo. 426, 25 S. W. 904, *Mechem's Cases*, 457 (overruling *Phelps v. McNeely*, 66 Mo. 555); *Seger's Sons v. Thomas Bros.*, 107 Mo. 635, 18 S. W. 23; *Wilcox v. Kellogg*, 11 Ohio, 394; *Anderson v. Norton*, 15 Lea (Tenn.) 14; *Carver Gin & Mach. Co. v. Bannon*, 85 Tenn. 712, 4 S. W. 831; *Hulskamp v. Moline Wagon Co.*, 121 U. S. 310; *Kincaid v. National Bank Paper Co.*, 63 Kan. 288, 65 Pac. 247, 54 L. R. A. 412.

There is considerable authority, however, for the view that a transfer of partnership property by one partner with the consent of the other partners, or by all the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent, and had sufficient property remaining to pay the partnership debts.¹⁸⁴

Even if insolvent, the firm may sell any of its property and convey a good title to the purchaser free from the claim of firm creditors.¹⁸⁵

The partners may, by mutual agreement, as by the sale of one partner's interest to his copartner, convert the partnership property into individual property, and thereby defeat the priority of firm creditors,¹⁸⁶ and it is immaterial whether

¹⁸⁴ *Bartlett v. Meyer-Schmidt Grocer Co.*, 65 Ark. 290, 45 S. W. 1063; *Teague v. Lindsey*, 106 Ala. 266, 17 So. 538, *Burdick's Cases*, 207; *Patterson v. Seaton*, 70 Iowa, 689, 33 N. W. 228; *Franklin Sugar Refining Co. v. Henderson*, 86 Md. 452, 38 Atl. 991; *Jackson Bank v. Durfey*, 72 Miss. 971, 18 So. 456, *Burdick's Cases*, 201; *Heineman v. Hart*, 55 Mich. 64, 20 N. W. 792; *Bannister v. Miller*, 54 N. J. Eq. 121, 32 Atl. 1066, *Burdick's Cases*, 207; *Clements v. Jessup*, 36 N. J. Eq. 569; *Arnold v. Hagerman*, 45 N. J. Eq. 186, 17 Atl. 93, *Mechem's Cases*, 446; *Bergman v. Jones*, 10 N. D. 520, 88 N. W. 284, 88 Am. St. Rep. 739; *Bulger v. Rosa*, 119 N. Y. 459, 24 N. E. 853; *Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 N. Y. 146, *Burdick's Cases*, 222, *Ames' Cas.* 229; *Wiggins v. Blackshear*, 86 Tex. 670, 26 S. W. 939, *Burdick's Cases*, 198; *Darby v. Gilligan*, 33 W. Va. 246, 10 S. E. 400. Compare *Nordlinger v. Anderson*, 123 N. Y. 544, 25 N. E. 992; *Bernheimer v. Rindskopf*, 116 N. Y. 428, 22 N. E. 1074.

¹⁸⁵ *Saunders v. Reilly*, 105 N. Y. 12, 12 N. E. 170, *Burdick's Cases*, 277.

¹⁸⁶ *Mayer v. Clark*, 40 Ala. 259; *Levy v. Williams*, 79 Ala. 171; *Schleicher v. Walker*, 28 Fla. 680, 10 So. 33; *Ladd v. Griswold*, 9 Ill. 25; *Singer v. Carpenter*, 125 Ill. 117, 17 N. E. 761; *City of Maquoketa v. Willey*, 35 Iowa, 323; *Woodmansie v. Holcomb*, 34 Kan. 35, 7 Pac. 603; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; *Griffith v. Buck*, 13 Md. 102; *Robb v. Mudge*, 14 Gray (Mass.) 534; *Maffyn v. Hathaway*, 106 Mass. 414; *Schmidlapp v. Currie*, 55 Miss. 597; *Sexton v. Anderson*, 95 Mo. 373, 8 S. W. 564; *Stanton v. Westover*, 101 N. Y. 265, 4 N. E. 529; *Menagh v. Whitwell*, 52 N. W. 146, *Burdick's Cases*,

the firm is solvent or not, provided the partners act in good faith,¹⁸⁷ though there are cases holding that such a conversion is void, as being in fraud of creditors, where the firm was at the time insolvent, or where there was no consideration,—as where one partner sells his interest to an insolvent copartner in consideration of the latter's assumption of the firm's debts.¹⁸⁸ Certainly, if either partner remains solvent and in the jurisdiction, or if the property remains in the

222; *Dimon v. Hazard*, 32 N. Y. 65; *Ketchum v. Durkee*, 1 Barb. Ch. (N. Y.) 480, 45 Am. Dec. 412; *Holmes v. Hawes*, 8 Ired. Eq. (N. C.) 21; *Mortley v. Flanagan*, 38 Ohio St. 401; *Baker's Appeal*, 21 Pa. 76; *Waterman v. Hunt*, 2 R. I. 298; *Croone v. Bivens*, 2 Head. (Tenn.) 339; *Case v. Beauregard*, 99 U. S. 119, *Mechem's Cases*, 440; *Ames' Cas.* 246; *Ex parte Ruffin*, 6 Ves. 119, *Burdick's Cases*, 192; *Bolton v. Fuller*, 1 Bos. & P. 539, *Burdick's Cases*, 187; *In re Kemptner*, L. R. 8 Eq. 286, *Burdick's Cases*, 196. The court will readily lay hold of any circumstance in the transaction to bring back the property into a just course of administration among the general firm creditors. Accordingly, if the transfer is executory or incomplete, the conversion may be defeated by the firm creditors. *In re Fear*, 4 Deacon & C. 56; *Fitzgerald v. Christl*, 20 N. J. Eq. 90. Partners may agree that any member may withdraw any part of the common stock. Such part will then become his own. *Lefevre's Appeal*, 69 Pa. 122. Partners may divide the firm property between them, and thus make it separate property. *Spencer v. Jones*, 92 Tex. 516, 50 S. W. 1118. Where a firm sells and transfers its property to a corporation for shares of the corporate stock, and the stock is divided among the partners, the stock is not partnership assets. *Singer v. Carpenter*, 125 Ill. 117, 17 N. E. 761.

¹⁸⁷ *Allen v. Center Valley Co.*, 21 Conn. 130; *Singer v. Carpenter*, 125 Ill. 117, 17 N. E. 761; *Myers v. Tyson*, 2 Kan. App. 464, 43 Pac. 91; *Howe v. Lawrence*, 9 Cush. (Mass.) 553; *Stanton v. Westover*, 101 N. Y. 265, 4 N. E. 529.

¹⁸⁸ *Smith v. Heineman*, 118 Ala. 195, 24 So. 364; *Roop v. Herron*, 15 Neb. 73, 17 N. W. 353; *Black's Appeal*, 44 Pa. 503; *Darby v. Gilligan*, 33 W. Va. 246; *Earle v. Art Library Pub. Co.*, 95 Fed. 544; *In re Cook*, 3 Biss. 122, Fed. Cas. No. 3,151; *Ex parte Mayou*, 4 De Gex, J. & S. 664. See *Brayton v. Sherman*, 45 App. Div. 58, 60 N. Y. Supp. 1118. The case of *Phelps v. McNeely*, 66 Mo. 554, took this view, but it has since been overruled in *Goddard-Peck Grocery Co. v. McCune*, 122 Mo. 426, 25 S. W. 904, *Mechem's Cases*, 457.

hands of the transferee for some time, the transaction cannot be said to hinder, delay, or defraud firm creditors, because, in such case, the firm creditor could proceed to make his claim out of either partner alone by legal process.¹⁸⁹

A partner may apply his individual property to the payment of firm debts, for such debts are in fact his debts,—so much so that, as has been seen, firm creditors may levy an attachment or execution upon such individual property;¹⁹⁰ but this has been held to be a fraud on the separate creditors where there are not enough separate assets left to pay them.¹⁹¹

SAME—APPLICATION BY COURT.

125. At law, creditors may gain certain priorities in the distribution of assets by superior diligence in prosecuting their claims.

126. In equity, the assets are distributed pro rata among the different classes of creditors entitled to them.

At law, a firm creditor may gain a priority over other firm creditors in the firm property by being the first to levy an attachment or execution thereon. He may gain a similar priority in individual assets even over individual creditors in the same manner, for, as has been seen, each partner is liable *in solido* for the firm debts. A legal priority once acquired, will be preserved in a subsequent distribution of assets by a court of equity.¹⁹²

¹⁸⁹ See *supra*, § 116; *Stanton v. Westover*, 101 N. Y. 265, 4 N. E. 529; *Wiggins v. Blackshear*, 86 Tex. 665, 26 S. W. 939, *Burdick's Cases*, 198.

¹⁹⁰ *Gadsden v. Carson*, 9 Rich. Eq. (S. C.) 252; *Gallagher's Appeal*, 114 Pa. 353, 7 Atl. 237; *Newman v. Bagley*, 16 Pick. (Mass.) 570, *Burdick's Cases*, 285.

¹⁹¹ *Holton v. Holton*, 40 N. H. 77; *O'Neil v. Salmon*, 25 How. Prac. (N. Y.) 246; *Jackson v. Cornell*, 1 Sandf. Ch. (N. Y.) 348.

¹⁹² *Steiner v. Peters Store Co.*, 19 Ala. 371, 24 So. 576; *Preston v.*

An individual creditor may obtain a priority in individual assets by being first with his execution, but he cannot obtain a corresponding priority in the firm property, because, although he may levy thereon, all he can sell is his debtor's interest therein, which is merely a share of what remains after paying all the partnership debts, and the settlement of the account between the partners.¹⁹³

When the assets are in the hands of a court of equity for distribution, as in the case of a bill for a settlement of the partnership affairs, an assignment for the benefit of creditors, bankruptcy, or the death of a partner, no creditor can obtain any advantage by superior diligence, but the assets will be equally distributed between creditors of the same class according to certain rules of priority, now to be considered.^{193a}

Colby, 117 Ill. 477, 4 N. E. 375; *Adams v. Sturges*, 55 Ill. 468; *Gillaspay v. Peck*, 46 Iowa, 461; *Smith v. Smith*, 87 Iowa, 93, 54 N. W. 73, 43 Am. St. Rep. 359; *Meech v. Allen*, 17 N. Y. 300, *Mechem's Cases*, 487, *Ames' Cas.* 326; *Wilder v. Keeler*, 3 Paige, Ch. (N. Y.) 167; *Cumming's Appeal*, 25 Pa. 268; *In re Sandusky*, 17 N. B. R. 452, *Burdick's Cases*, 421, *Fed. Cas. No.* 12,308. A judgment against the firm is a lien on the separate real estate of the partners, and is entitled to priority over a subsequent judgment in favor of a separate creditor. *Cumming's Appeal*, 25 Pa. 268.

¹⁹³ See ante, § 72. A chattel mortgage on firm property executed by the firm takes priority over an execution against an individual partner, levied before the mortgage was executed. *Swan v. Gilbert*, 175 Ill. 204, 51 N. E. 604. A chattel mortgage on one partner's interest to secure an individual debt is postponed to a subsequent execution in favor of firm creditors. *Daniel v. Crowell*, 125 N. C. 519, 34 S. E. 684. A separate execution is postponed to a subsequent joint execution. *King's Appeal*, 9 Pa. 124; *Cooper's Appeal*, 29 Pa. 9; *Dyer v. Clark*, 5 Metc. (Mass.) 562, *Ames' Cas.* 251. If a separate execution creditor levy upon the joint stock, and the other partners have no equities against the defendant in the execution, having parted with their lien, the separate creditor will take the proceeds of sale in preference to a subsequent joint execution. *York County Bank's Appeal*, 32 Pa. 446.

^{193a} See *Foster v. Field*, 13 Okl. 230, 74 Pac. 190; *Adams v. Hackett*, 7 Cal. 187; *Holmes v. McDowell*, 15 Hun (N. Y.) 585, *Burdick's Cases*, 434; *Jackson v. Lahee*, 114 Ill. 287, 2 N. E. 172.

127. Priorities in Firm Property.—Firm assets must be applied to the discharge of firm debts, in preference to the claims of the partners or of their individual creditors, except—

Exceptions—

- (a) Where firm assets have been converted in good faith into separate property.
- (b) Where the separate estate of a partner has been fraudulently converted to the use of the firm.
- (c) Where a partner carries on a separate business, and becomes a creditor in respect to that business.
- (d) Where a partner has been discharged in bankruptcy, and has afterwards become a creditor of his former partnership.

128. The so-called partner's lien is superior to the claims of the other partners or their creditors to any part of the firm assets.

Firm Creditors have Priority.

Where the assets of a partnership are in the hands of a court of equity for distribution to the parties entitled thereto, the rule is well established that such assets must be first applied to the payment of the firm creditors before any portion can be applied to the claims of the individual partners or their creditors.¹⁹⁴ This priority does not result from any lien

¹⁹⁴ *Weil v. Jaeger*, 174 Ill. 133, 51 N. E. 196; *Hargadine-McKittrick Dry Goods Co. v. Belt*, 74 Ill. App. 581; *Coe v. Simmons Boot & Shoe Co.*, 61 Ill. App. 602; *Preston v. Colby*, 117 Ill. 477, 4 N. E. 375; *Bush v. Clark*, 127 Mass. 111; *Edison Electric Illuminating Co. v. DeMott*, 51 N. J. Eq. 16, 25 Atl. 952; *Wilder v. Keeler*, 3 Paige, Ch. (N. Y.) 167; *Kirby v. Carpenter*, 7 Barb. (N. Y.) 373; *Ganson v. Lathrop*, 25 Barb. (N. Y.) 455; *Payne v. Matthews*, 6 Paige, Ch. (N. Y.) 19; *Rodgers v. Meranda*, 7 Ohio St. 179, *Mechem's Cases*, 463; *In re Stewart*, 193 Pa. 347, 44 Atl. 434; *Hoffer's Appeal*, 3

which the firm creditors have upon the firm assets, because they have no lien on such assets, any more than any simple creditor has upon the property of his debtor. It results from the lien which as has been seen,^{194a} each partner has, to have the assets applied first to the payment of firm debts, and then to the payment of whatever may be due him from the other partners on partnership account. The firm creditors are practically subrogated to this lien, and their right to a priority depends upon it.¹⁹⁵ This priority of the firm creditors ex-

Brewst. (Pa.) 164; Black's Appeal, 44 Pa. 503; Andress v. Miller, 15 Pa. 316; Houseal's Appeal, 45 Pa. 484; Gordon's Estate, 3 W. N. C. (Pa.) 410; Frow's Estate, 73 Pa. 459; Amsinck v. Bean, 22 Wall. (U. S.) 395. But see U. S. Bankruptcy Law 1898, § 5 (g). "The rule is that a partner in a firm against which a commission of bankruptcy issues shall not prove in competition with the creditors of the firm, who are in fact his own creditors; shall not take part of the fund to the prejudice of those who are not only creditors of the partnership, but of himself." *Ex parte Sillitoe*, 1 Glyn & J. 374, Ames' Cas. 428.

B. & L. were partners. B. & L., as a partnership, was also a member of two other firms—B., L. & S. and B., L. S. & D. The firms all failed, and their property was attached by creditors. The creditors of B., L. & S. and B. L., S. & D. obtained the first attachments, and placed them in the hands of the sheriff, before the creditors of B. & L. placed theirs in his hands. The sheriff levied all the writs on the property in the order in which they were placed in his hands. The sheriff had in his hands a sum of money received from the sale of the property of B. & L. to apply on the executions issued on judgments rendered in the actions. Held, that the creditors of B. & L. were entitled to the money, and that, where a partnership is composed of two or more firms, the creditors of one of the firms are entitled to a preference, in the payment of their debts over the creditors of the whole partnership, out of the money or the proceeds of the property of that firm." *Bullock v. Hubbard*, 23 Cal. 495.

^{194a} Ante, § 102.

¹⁹⁵ *Allen v. Center Valley Co.*, 21 Conn. 130, 54 Am. Dec. 333; *Hawk Eye Woolen Mills v. Conklin*, 26 Iowa, 422; *Saunders v. Reilly*, 105 N. Y. 12, 12 N. E. 170, *Burdick's Cases*, 277; *Foster v. Barnes*, 81 Pa. 377; *Bardwell v. Perry*, 19 Vt. 292, 47 Am. Dec. 687; *Hapgood v. Cornwell*, 48 Ill. 64; *John Spry Lumber Co. v. Chappell*, 184 Ill. 539, 56 N. E. 794; *Warren v. Farmer*, 100 Ind. 593; *Robb v.*

tends to the case of a partnership by estoppel, or holding out.¹⁹⁶ Joint but not partnership creditors cannot claim this priority, for a partner's lien upon which this equity rests does not extend to such debts. Accordingly, such debtors are post-

Stevens, Clarke, Ch. (N. Y.) 191; Ketchum v. Durkee, 1 Barb. Ch. (N. Y.) 480; Lefevre's Appeal, 69 Pa. St. 126; York County Bank's Appeal, 32 Pa. 446; Doner v. Stauffer, 1 Pen & W. (Pa.) 198, Burdick's Cases, 218; Snodgrass' Appeal, 13 Pa. 471; Schuster v. Farmers' & Merchants' Nat. Bank, 23 Tex. Civ. App. 206, 54 S. W. 777, 55 S. W. 1121, 56 S. W. 93; Case v. Beauregard, 99 U. S. 119, Mechem's Cases, 440, Ames' Cas. 246; Fitzpatrick v. Flannagan, 106 U. S. 648; Ex parte Ruffin, 6 Ves. 127, Burdick's Cases, 192, 19 Eng. Rul. Cas. 628. Compare Ferson v. Monroe, 1 Fost. (N. H.) 462; Tenney v. Johnson, 43 N. H. 144. In Case v. Beauregard, 99 U. S. 119, 124, 125, Mechem's Cases, 440, Mr. Justice Strong stated the law as follows: "The right of each partner extends only to the share of what may remain after payment of the debts of the firm and a settlement of its accounts. Growing out of the right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts, in preference to those of any individual partner. This is an equity that partners have between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference, sometimes loosely denominated a 'lien,' to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be." A simple creditor of a firm, although he has no lien upon its assets, has such an interest therein as entitles him to attack for fraud a chattel mortgage executed by the firm to other creditors. Taylor v. Riggs, 8 Kan. App. 323, 57 Pac. 44.

¹⁹⁶ Van Kleeck v. McCabe, 87 Mich. 599, 40 N. W. 872; Gibbs v. Humphrey, 91 Wis. 111, 64 N. W. 750, Burdick's Cases, 475; Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007, Burdick's Cases, 117; Kelly v. Scott, 49 N. Y. 595. See, also, Adams v. Albert, 155 N. Y. 356, 49 N. E. 929. Compare Broadway Nat. Bank v. Wood, 165 Mass. 312, 43 N. E. 100, Burdick's Cases, 129; Swann v. Sanborn, 4 Woods, 625, Fed. Cas. No. 13,675.

poned to the firm creditors.¹⁹⁷ And it naturally results from the rule that sale or mortgage by a partner conveys only his interest after settlement,^{197a} that the mortgagee of a partner's interest stands in no better position.^{197b}

Exceptions to Rule—Conversion of Firm into Separate property.

Since the priority of firm creditors depends upon the existence of the partner's lien, if the partners themselves are not in a condition to enforce it, the firm creditors cannot, and their priority is gone. This is the case where the partners have in good faith converted the firm property into separate property.¹⁹⁸ The right of the partners to do this as against firm creditors has been already considered.¹⁹⁹

Same—Fraudulent Conversion of Individual Property.

Where the separate property of a partner has been fraudulently converted to the use of the firm, the equity of such partner or of his creditors to have its value restored to his estate is of equal grade with the claims of firm creditors.²⁰⁰

¹⁹⁷ Second Nat. Bank v. Burt, 93 N. Y. 233; Turner v. Jaycox, 40 N. Y. 470; Forsyth v. Woods, 11 Wall. (U. S.) 484.

^{197a} See ante, § 73.

^{197b} Daniel v. Crowell, 125 N. C. 519, 34 S. E. 684.

¹⁹⁸ Case v. Beauregard, 99 U. S. 119, Mechem's Cases, 440, Ames' Cas. 246; West v. Skip, 1 Ves. Sr. 239, 19 Eng. Rul. Cas. 618; Ex parte Ruffin, 6 Ves. 119, Burdick's Cases, 192, 19 Eng. Rul. Cas. 618; Rice v. Barnard, 20 Vt. 479; York County Bank's Appeal, 32 Pa. 446; Lefevre's Appeal, 69 Pa. 126; Walker v. Eyth, 25 Pa. 216; Robb v. Stevens, Clark, Ch. (N. Y.) 191; Sage v. Chollar, 21 Barb. (N. Y.) 596. Where two of five partners assign all their interest in the partnership property to the other three, who assume the firm debts, the firm creditors have no lien thereon. The remaining partners may assign for the benefit of their own creditors. Baker's Appeal, 21 Pa. 76.

¹⁹⁹ See ante, § 124 et seq.

²⁰⁰ Bates, Partn. § 837; Rodgers v. Meranda, 7 Ohio St. 179, 194,

Same—Separate Business

Where a partner carries on a business on his own account, either by himself or with others, separate and distinct from the business of the firm, a claim on account of such separate business may be proved in competition with firm creditors.²⁰¹ It is only where articles of one trade have been furnished to the other that the exception applies.²⁰²

Same—Partners Discharged in Bankruptcy.

A partner who has become bankrupt and been discharged from his debts, and afterwards becomes a creditor of his former firm, may share with the firm creditors in the firm assets.²⁰³

Partners are Prior to Individual Creditors.

A partner's lien extends to claims for advances, etc., and takes precedence of the claims of the individual creditors of the other partners.²⁰⁴

Burdick's Cases, 424, Mechem's Cases, 463; Ex parte Sillitoe, 1 Glyn & J. 374, Ames' Cas. 430; Ex parte Kendal, 1 Rose, 71.

²⁰¹ Bates, Partn. § 837; Ex parte Sillitoe, 1 Glyn & J. 374, Ames' Cas. 428; Ex parte Cook, Montagu, 228, Ames' Cas. 432; In re Buckhouse, 2 Low. 331, Fed. Cas. No. 2,086; Rodgers v. Meranda, 7 Ohio St. 179, Burdick's Cases, 424, Mechem's Cases, 463. But see In re Rieser, 19 Hun (N. Y.) 202.

²⁰² The debt must grow out of a transaction between trade and trade, in order to fall within the exception. The mere fact that a partner loaned his firm £100, and that he also carried on a separate trade, is not sufficient. Ex parte Sillitoe, 1 Glyn & J. 374, Ames' Cas. 421.

²⁰³ Bates, Partn. § 837.

²⁰⁴ See ante, § 102, "Partner's Lien." See, also, Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165; Crooker v. Crooker, 52 Me. 267; Hapgood v. Cornwell, 48 Ill. 64; Walter v. Herman, 23 Ky. L. R. 741, 62 S. W. 857; West v. Skip, 1 Ves. Sr. 242, 19 Eng. Rul. Cas. 622. Representatives of partner entitled to set off debts, and have all allowances before the separate creditors of the other can take his share; and they have a lien for such demand. West v. Skip, 1 Ves. Sr. 239, 19 Eng. Rul. Cas. 618.

129. Priorities in Separate Property.—Individual assets must be applied to the discharge of individual debts, in preference to firm debts, except—

Exceptions—

- (a) In some jurisdictions, individual creditors have no priority over firm creditors.
- (b) Where there is no joint estate, and no living solvent partner, the individual creditors have no priority.
- (c) Where there is a secret or dormant partner, but no ostensible firm, firm creditors may prove against either joint or separate estate.

Separate Creditors have Priority in Separate Property.

It is the prevailing rule in most jurisdictions that the separate estate of a partner must be applied to the payment of his individual debts, in preference to the debts of a firm of which he is a member,—in short, that separate creditors have a priority over firm creditors in the distribution of the separate estate.²⁰⁵ It is difficult, if not impossible, to assign any

²⁰⁵ Emanuel v. Bird, 19 Ala. 596; Brown v. Stewart, 78 Ill. App. 387; Moline Water Power & Mfg. Co. v. Webster, 26 Ill. 233; Doggett v. Dill, 108 Ill. 560, Burdick's Cases, 495, Mechem's Cases, 395; Union Nat. Bank v. Bank of Commerce, 94 Ill. 271; Hundley v. Farria, 103 Mo. 78, 15 S. W. 312; Davis v. Howell, 33 N. J. Eq. 72; Burdick's Cases, 438; Greene v. Butterworth, 45 N. J. Eq. 738, 17 Atl. 949; Wilder v. Keeler, 3 Paige Ch. (N. Y.) 167; Kirby v. Carpenter, 7 Barb. (N. Y.) 373; Ganson v. Lathrop, 25 Barb. (N. Y.) 455; Payne v. Matthews, 6 Paige Ch. (N. Y.) 19; Meech v. Allen, 17 N. Y. 300; Rodgers v. Meranda, 7 Ohio St. 179, Paige's Cas. 223, Burdick's Cases, 424, Mechem's Cases, 463; Black's Appeal, 44 Pa. 503; Lord v. Devendorf, 54 Wis. 491, 11 N. W. 903; Murrill v. Neill, 8 How. (U. S.) 414; Peters v. Bain, 133 U. S. 670; In re Estes, 3 Fed. 134; Ex parte Crowder, 2 Vern. 706. The United States bankruptcy law of 1898 expressly declares that the joint estate must be applied first in payment of joint creditors, and the separate estate in payment of separate creditors, and only the surplus of each estate is to be applied

sound legal reason for this rule.²⁰⁶ It really rests upon considerations of convenience and the notion that, inasmuch as firm creditors have a priority in firm assets, it is no more than just that separate creditors should have a similar priority in separate assets.²⁰⁷ It should be noted, however, that there is not a similar reason for the priority, the firm creditor's priority resting upon the equity of the other partners to have the firm assets applied to firm debts. But at all events, the rule as stated prevails in England and the majority of the states of this country.

The rule giving the separate creditors a priority over the firm creditors in the distribution of the separate estate has not been universally adopted. Some courts, recognizing the indisputable fact that the firm creditors are as much the creditors of a partner as his individual creditors, have held that firm creditors are entitled to share *pari passu* with the separ-

in satisfaction of the other class of creditors. The rule has been laid down in almost similar terms, even in the absence of statute. See *Murrill v. Neill*, 8 How. (U. S.) 414; *Ex parte Dear*, 1 Ch. Div. 519. And see cases cited *supra*, this note.

Partnership realty, although standing in the name of the individual members, is treated in equity as personalty belonging to the firm, and subject to the payment of the partnership debts. *Long v. Slade*, 121 Ala. 267, 26 So. 31; *Overholt's Appeal*, 12 Pa. 222; *Lancaster Bank v. Myley*, 13 Pa. 544. And see, generally, ante, §§ 79, 80. As to personalty standing in the name of one partner, but in reality belonging to the firm, see *New York Commercial Co. v. Francis*, 96 Fed. 266. The fact that a creditor has reduced a joint and several liability for partnership tort to a joint judgment does not prevent him from enforcing it against the separate estate of the debtors. In *re Blackford*, 35 App. Div. 330.

²⁰⁶ *Rodgers v. Meranda*, 7 Ohio St. 179, *Paige's Cas.* 223, *Burdick's Cases*, 424, *Mechem's Cases*, 463; *Gray v. Chiswell*, 9 Ves. 126; *Dutton v. Morrison*, 17 Ves. 211; *Lodge v. Prichard*, 1 De Gex, J. & S. 613.

²⁰⁷ *Rodgers v. Meranda*, 7 Ohio St. 179, 180; *Paige's Cas.* 223, *Burdick's Cases*, 424, *Mechem's Cases*, 463; *Davis v. Howell*, 33 N. J. Eq. 72, *Burdick's Cases*, 438; *Ex parte Cook*, 2 P. Wms. 500; *Lacey v.*

ate creditors in the separate estate.²⁰⁸ With one qualification, this rule is correct on principle. This qualification is that firm creditors should be compelled to first exhaust the joint estate, after which they should be admitted to share *pari passu* with the individual creditors in the whole of the separate estate. This rests upon the equitable doctrine of the marshalling of assets.²⁰⁹

Exceptions to Rule—No Joint Estate nor Living Solvent Partner.

Where there is no joint estate and also no living solvent partner to whom the firm creditors could resort, the rule does not apply, and both firm and separate creditors share equally in the separate estate,²¹⁰ though some courts have taken a contrary view.²¹¹

Hill, L. R. 8 Ch. App. 444. The rule rests upon the equities of the partners, and not upon the equities of the creditors. *Brown v. Stewart*, 78 Ill. App. 387.

²⁰⁸ *Hultzer v. Phillips*, 26 S. C. 136, 1 S. E. 502; *Bardwell v. Perry*, 19 Vt. 292, 47 Am. Dec. 687; *Pettyjohn's Ex'rs v. Woodruff's Ex'rs*, 86 Va. 478, 10 S. E. 715; *Ex parte Copland*, 1 Cox, 420.

²⁰⁹ *Hultzer v. Phillips*, 26 S. C. 136, 1 S. E. 502; *Blair v. Black*, 31 S. C. 346, 9 S. E. 1033, *Mechem's Cases*, 477; *Bardwell v. Perry*, 19 Vt. 292; *Adams v. Sturges*, 55 Ill. 468. In Kentucky, the rule prevailing allows the separate creditors to make the same percentage of their debts out of the separate property that the firm creditors have made out of the firm property, after which both classes of creditors share *pari passu* in the balance of the individual estate. *Fayette Nat. Bank v. Kenney's Assignee*, 79 Ky. 133. See, also, *Bell v. Newman*, 5 Serg. & R. (Pa.) 78. But this rule cannot be sustained on principle, any more than the rule giving the separate creditors an absolute priority. It is erroneous in not allowing the firm creditors to share in the whole of the separate estate after exhausting the joint estate.

²¹⁰ *Pahlman v. Graves*, 26 Ill. 405; *Ladd v. Griswold*, 9 Ill. 25; *Curtis v. Woodward*, 58 Wis. 499, 17 N. W. 328; *Emanuel v. Bird*, 19

²¹¹ *Howe v. Lawrence*, 9 Cush. (Mass.) 553; *In re Gray's Estate*, 111 N. Y. 404, 18 N. E. 719; *Warren v. Farmer*, 100 Ind. 593.

Same—Secret Partnerships.

Where there is an actual but not an ostensible partnership, all the partners but one being secret or dormant, the joint creditors have an election to proceed against either the separate estate of the ostensible partner, or against the joint estate. But if the firm creditors resort to the separate estate, the separate creditors will be subrogated to their rights against the joint estate.²¹²

130. Individual assets must be applied to the discharge of individual debts, in preference to a debt of the partner to his firm, except—

Exceptions—

- (a) Where the debt to the firm arises from a fraudulent conversion of its property.
- (b) Where the debt is in respect to a separate business carried on by the partners.

The firm, as a creditor of a partner, cannot compete with the latter's individual creditors in the separate estate, because this would, in effect, allow the bankrupt partner to compete with his own creditors.²¹³

Ala. 596; *In re West*, 39 Fed. 203; *Alexander v. Gorman*, 15 R. I. 421, 7 Atl. 243; *McCulloh v. Dashiell's Adm'r*, Har. & G. (Md.) 96; *Conrader v. Cohen*, (C. C. A.) 121 Fed. 801; *In re Sperry's Estate*, 1 Ashm. (Pa.) 347; *In re Lloyd*, 22 Fed. 88; *Ex parte Hayden*; 1 Brown Ch. 454.

²¹² *Elliot v. Stevens*, 38 N. H. 311; *Van Valen v. Russell*, 13 Barb. (N. Y.) 590; *Ex parte Reid*, 2 Rose, 84, Ames' Cas. 427; *Reynolds v. Bowley*, L. R. 2 Q. B. 474. But see *Lord v. Baldwin*, 6 Pick. (Mass.) 348. Where the partnership is a secret one, a separate creditor of the ostensible owner of the property, who first levies his execution, will be preferred to a subsequent levy under an execution against the partnership. In such a case, equity leaves the parties to their rights at law. *Brown's Appeal*, 17 Pa. St. 480. It is a race of diligence. *Whitworth v. Patterson*, 6 Lea (Tenn.) 119.

²¹³ *Harmon v. Clark*, 13 Gray (Mass.) 114; *Somerset Potters Works*

Exceptions to Rule.

Where a partner is indebted to his firm on account of his fraudulent conversion of its property to his own use, the firm may, to this extent, share with the individual creditors in the separate estate.²¹⁴ This is obviously no more than justice. As has been seen, a similar exception allows a partner to compete with firm creditors in the joint estate under similar circumstances. Another exception has been allowed where the debt to the firm grew out of dealings between the firm and the partner in respect to a separate trade carried on by the latter.²¹⁵

131. Individual assets must be applied to the discharge of firm debts, in preference to a debt to a copartner.

Firm creditors have a priority in the separate estate over a partner who is a creditor of the bankrupt partner, because otherwise such partner would be competing with his own creditors.²¹⁶

132. Individual assets must be applied to the discharge of individual debts, in preference to a debt of the partner to his copartner, except—

Exceptions—

- (a) Where there are no firm debts, and
- (b) Where the separate estate is insufficient to pay the other separate creditors in full.

Where there are both firm and separate creditors, the separate assets must be applied in payment of the separate cred-

v. Minot, 10 Cush. (Mass.) 592; In re Hamilton, 1 Fed. 800; Am-sinck v. Bean, 22 Wall. (U. S.) 395; Read v. Bailey, 3 App. Cas. 94, Ames' Cas. 409; Ex parte Lodge, 1 Ves Jr. 166, Ames' Cas. 394.

²¹⁴ Read v. Bailey, 3 App. Cas. 94; Lacey v. Hill, 4 Ch. Div. 537; Ex parte Yonge, 3 Ves. & B. 81; Cowan v. Gill, 11 Lea (Tenn.) 674.

²¹⁵ Ex parte St. Barbe, 11 Ves. 413.

²¹⁶ Ex parte Carter, 2 Glyn & J. 233.

itors before payment to a copartner who is also a separate creditor.²¹⁷ The reason for this is that, if such partner shared equally with the other separate creditors, the surplus of the separate estate, which alone is applicable to firm creditors, would be diminished, or, in other words, the partner would be competing with the firm, and therefore his own creditors, which is never permitted. This reason does not exist where there are no firm creditors, as where all firm debts have been satisfied and discharged in any manner. Accordingly, in such a case, a partner may share equally with other separate creditors in his debtor partner's separate estate.²¹⁸ So, also, the reason fails where the separate estate is insufficient to pay the other separate creditors in full, for in such case there would be no surplus applicable to firm creditors, and hence the partner is not competing with firm creditors. Accordingly, in such case also, a partner may share with the separate creditors.²¹⁹

²¹⁷ *Hill v. Beach*, 12 N. J. Eq. 31; *Ex parte Kendall*, 17 Ves. 514, 521; *Ex parte Maude*, L. R. 2 Ch. App. 550; *Nanson v. Gordon*, 1 App. Cas. 195.

²¹⁸ *Price v. Cavins*, 50 Ind. 122; *Hill v. Beach*, 12 N. J. Eq. 31; *Payne v. Matthews*, 6 Paige Ch. (N. Y.) 19; *Scott's Appeal*, 88 Pa. 173; *Amsinck v. Bean*, 22 Wall. (U. S.) 395; *In re Dell*, 5 Sawy. 344, Fed. Cas. No. 3,774; *Ex parte Andrews*, 25 Ch. Div. 505; *Ex parte Crazebrook*, 2 Deac. & C. 186; *Ex parte King*, 17 Ves. 115. Compare *Ex parte Moore*, 2 Glyn & J. 166.

²¹⁹ *Ex parte Topping*, 4 De Gex, J. & S. 551. See, also, *Payne v. Matthews*, 6 Paige Ch. (N. Y.) 19.

CHAPTER X.

ACTIONS.

- 133. Actions in Firm Name.
- 134. Actions by the Firm.
- 135. Disqualification of One Partner to Sue.
- 136. Actions against the Firm.
- 137. Actions between Partners.
- 138. Actions between Firms with a Common Member.
- 139. Actions on Individual Obligations.
- 140-141. Suits in Equity.

ACTIONS IN FIRM NAME.

133. Actions upon firm liabilities or demands must be brought by or against the individual partners, except—

Exception—In some states statutes exist authorizing partnerships to sue and be sued in their firm name.

In the absence of statute, actions by or against partnerships must be brought by or against the individual partners in their individual names.¹ The members of the firm are the real parties in interest.²

In a number of states, statutes have been passed authorizing actions to be brought by or against partnerships in their

¹ *Roberts v. Rowan*, 2 Har. (Del.) 314; *Page v. Brant*, 18 Ill. 38; *Davis v. Hubbard*, 4 Blackf. (Ind.) 50; *Barber v. Smith*, 41 Mich. 138, 1 N. W. 992; *Mitchell v. Rallton*, 45 Mo. App. 273; *Lewis v. Cline* (Miss.), 5 So. 112; *Crawford v. Collins*, 45 Barb. (N. Y.) 269. In Iowa, in the absence of statute, it was held that suits might be in the firm name. See *Johnson v. Smith, Morris* (Iowa) 106.

² *Mitchell v. Rallton*, 45 Mo. App. 273.

firm name.³ Under these statutes, suits may be brought either in the firm name or in the name of the individual members.⁴ Proceedings in the firm name under these statutes are in the nature of proceedings *in rem*.⁵ Judgment should be entered in firm name.⁶ These statutes do not have the effect of authorizing suits between a partner and his firm, or between two firms with a common member.⁷

ACTIONS BY THE FIRM.

134. All the partners must join as plaintiffs in an action upon a cause of action belonging to the firm, except—

Exceptions—

- (a) Dormant and nominal partners are proper, but not necessary, parties plaintiff.
- (b) Where a contract is under seal, only those partners named therein can sue.
- (c) A partner may and sometimes must sue alone on contracts made in his name.
- (d) When the contract is a negotiable instrument, only the partners named in the instrument can sue thereon.

³ See *Atlantic Glass Co. v. Paulk*, 83 Ala. 404, 8 So. 800; *United States Exp. Co. v. Bedbury*, 84 Ill. 459; *Abernathy v. Latimore*, 19 Ohio, 286; *Whitman v. Keith*, 18 Ohio St. 145; *City of Opelika v. Daniel*, 59 Ala. 213; *Leach v. Milburn Wagon Co.*, 14 Neb. 106, 15 N. W. 232.

⁴ *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456; *Whitman v. Keith*, 18 Ohio St. 144. An appeal by a partner in his own name is not authorized by a statute authorizing suits or appeals by a partner in the firm name. *Kline v. Swift Specific Co.*, 113 Ga. 514, 45 S. E. 314.

⁵ *Yarbrough v. Bush*, 69 Ala. 170.

⁶ *Wyman v. Stewart*, 42 Ala. 163; *Storm v. Roberts*, 54 Iowa, 677, 7 N. W. 124; *Hawkins v. Lesley*, 40 Ohio St. 37.

⁷ *Pollock, Partn.* p. 121. But see 2 *Bates, Partn.* § 903, wherein

In an action upon a firm contract, all the persons who were partners at the time it was made should be joined as plaintiffs,⁸ even after dissolution.^{8a} An infant partner should be joined as a party plaintiff.⁹ No one who is not either an actual or an ostensible partner should be joined with the actual partners.¹⁰

A dormant partner may or may not be joined as plaintiff in a suit, and the joinder or omission is no ground for abatement, non-suit, or writ of error. In other words, dormant partners are always proper, but never necessary, parties plaintiff.¹¹ Nominal partners are proper, but not necessary, parties plaintiff. They may, but need not, be joined.¹²

a contrary opinion is expressed. See, also, generally, *infra*, § 137 et seq.

⁸ *American Cent. R. Co. v. Miles*, 52 Ill. 174; *Hyde v. Moxie Nerve-Food Co.*, 160 Mass. 559, 36 N. E. 585, *Burdick's Cases*, 159; *McDonnell v. Ford*, 87 Mich. 198, 49 N. W. 545; *Dob v. Halsey*, 16 Johns. (N. Y.) 34; *Waterbury v. Head*, 12 N. Y. St. Rep. 361; *DeWit v. Lander*, 72 Wis. 120, 39 N. W. 349; *Bumpus v. Turgeon*, 98 Me. 550, 57 Atl. 383.

^{8a} *Brann v. Woollacott*, 129 Cal. 107, 61 Pac. 801.

⁹ *Kell v. Nainby*, 10 Barn. & C. 20; *Osburn v. Farr*, 42 Mich. 134, 3 N. W. 299.

¹⁰ *Delise v. Palladino*, 16 Misc. Rep. 74, 37 N. Y. Supp. 705.

¹¹ *Lloyd v. Archbowle*, 2 Taunt. 324; *Monroe v. Ezzell*, 11 Ala. 603; *Wilson v. Rockland Mfg. Co.*, 2 Har. (Del.) 67; *Mitchell v. Dall*, 2 Har. & G. (Md.) 159; *Warner v. Griswold*, 8 Wend. (N. Y.) 666; *Belshaw v. Colle*, 1 E. D. Smith (N. Y.) 213; *Howe v. Savory*, 49 Barb. (N. Y.) 403; *Bird v. Fake*, 1 Pin. (Wis.) 290; *Desha v. Holland*, 12 Ala. 513; *Goble v. Gale*, 7 Blackf. (Ind.) 218; *Howe v. Savory*, 51 N. Y. 631; *Hilliker v. Loop*, 5 Vt. 116, 26 Am. Dec. 286. Compare *Secor v. Keller*, 4 Duer (N. Y.) 416, wherein it is held that a dormant partner is a real party in interest, and therefore must be joined under the Code.

¹² *Kell v. Nainby*, 10 Barn. & C. 20; *Enix v. Hays*, 48 Iowa, 86; *Hatch v. Wood*, 43 N. H. 633; *Lewis v. Greider*, 51 N. Y. 231. Where the nominal partner is named in the contract, he is a necessary party plaintiff. *Guidon v. Robson*, 2 Camp. 302, *Ames' Cas.* 140. Compare *Kell v. Nainby*, 10 Barn. & C. 20, *Ames' Cas.* 143; *Cox v.*

Where the contract is made in the name of one partner, but for the benefit of the firm, all the partners should join as plaintiffs in an action thereon.¹³ But where the contract is under seal, only the partner in whose name it was made can sue thereon.¹⁴ One partner may or must sue alone upon a contract made in his name in cases where an agent may or must sue alone upon a contract made for his principal. Where a contract is made with one partner in his individual capacity, he must sue alone thereon, although he may have in fact been acting for the benefit of the firm.¹⁵ When the firm occupies substantially the position of an undisclosed principal, the action may be brought either by all the partners jointly, or by the partners alone in whose name the contract was made.¹⁶

It is a general rule at common law that no person can maintain an action upon a negotiable instrument except the parties named therein. Even though the party entitled upon such an instrument is an agent, the action must be brought in his name, and cannot be brought in the name of the principal who is not a party.¹⁷ Accordingly, where a negotiable instru-

Hubbard, 4 C. B. 317; *Spurr v. Cass*, L. R. 5 Q. B. 656; *Bishop v. Hall*, 9 Gray (Mass.) 430.

¹³ *Garrett v. Handley*, 3 Barn. & C. 465; *Gilbert v. Lichtenberg*, 98 Mich. 417, 57 N. W. 259; *McDonnell v. Ford*, 87 Mich. 198, 49 N. W. 545; *Wiley v. Logan*, 95 N. C. 358; *Wilson v. Wallace*, 8 Serg. & R. (Pa.) 53; *Robbins v. Deverell*, 20 Wis. 142; *Badger v. Dae-nieke*, 56 Wis. 678, 14 N. W. 821.

¹⁴ *Ex parte Peele*, 6 Ves. 602; *Mead v. Tomlinson*, 1 Day (Conn.) 148; *Faulkner v. Brigel*, 101 Ind. 329.

¹⁵ *Phillips v. Pennywit*, 1 Ark. 59; *Burwitz v. Jeffers*, 103 Mich. 512, 61 N. W. 784; *Barns v. Barrow*, 61 N. Y. 39; *Beakes v. Da Cunha*, 126 N. Y. 293, 27 N. E. 251.

¹⁶ *Platt v. Halen*, 23 Wend. (N. Y.) 456; *Beakes v. Da Cunha*, 126 N. Y. 293, 27 N. E. 251; *Warner v. Griswold*, 8 Wend. (N. Y.) 665; *Illinois Cent. R. Co. v. Owens*, 53 Ill. 391; *James T. Hair Co. v. Thorne*, 27 Ill. App. 502; *Jackson v. Bohrman*, 59 Wis. 422, 18 N. W. 456; *Philpott v. Bechtel*, 104 Mich. 79, 62 N. W. 174.

¹⁷ *Leake*, Cont. p. 302.

ment is made payable to one partner, although it is a partnership transaction, and intended for the benefit of the firm, such partner must sue alone thereon,¹⁸ unless it has been transferred by endorsement to the firm, in which case all the partners may sue jointly.¹⁹ The facility with which negotiable paper may be transferred so as to authorize the transferee to sue in his own name, and the very general prevalence of statutes requiring all actions to be brought in the names of the real parties in interest, render these rules of small practical importance.

Where a tort results in damage to the firm as a firm, all the partners must join as plaintiffs.²⁰ A partner may and must sue alone for damages suffered by him individually.²¹ The same act may give rise to two causes of action,—one in favor of all the partners jointly for their joint damage, and one in favor of each of the partners separately to recover his individual damage.²² In an action for defamation of the firm, brought by all the partners jointly, no recovery can be had for damages suffered by the partners individually.²³

¹⁸ *Mynderse v. Snook*, 53 Barb. (N. Y.) 234; *Driver v. Burton*, 17 Q. B. 989; *Bawden v. Howell*, 3 Man. & G. 638; *Dacey, Parties*, p. 153.

¹⁹ *Pease v. Hirst*, 10 Barn. & C. 122.

²⁰ *Pechell v. Watson*, 8 Mees. & W. 691; *Donnell v. Jones*, 13 Ala. 490; *Sindelare v. Walker*, 137 Ill. 43, 27 N. E. 59, *Burdick's Cases*, 304, *Mechem's Cases*, 154; *Medbury v. Watson*, 6 Metc. (Mass.) 246; *Bigelow v. Reynolds*, 68 Mich. 344, 36 N. W. 95; *Taylor v. Church*, 1 E. D. Smith (N. Y.) 279; *Saul v. Kruger*, 9 How. Prac. (N. Y.) 569.

²¹ *Story v. Richardson*, 6 Bing. N. C. 123; *Rogers v. Raynor*, 102 Mich. 473, 60 N. W. 980; *McCoy v. Brennan*, 61 Mich. 362, 28 N. W. 129; *Calkins v. Smith*, 48 N. Y. 614; *Russell v. Lennon*, 39 Wis. 570.

²² *Harrison v. Bevington*, 8 Car. & P. 708; *Duffy v. Gray*, 52 Mo. 528; *Wills v. Jones*, 13 App. D. C. 482 (libel).

²³ *Booth v. Briscoe*, 2 Q. B. Div. 496; *Duffy v. Gray*, 52 Mo. 528; *Taylor v. Church*, 1 E. D. Smith (N. Y.) 279.

SAME—DISQUALIFICATION OF ONE PARTNER TO SUE.

135. All the partners joined as plaintiffs in an action at law must be entitled to recover, or the action cannot be maintained.

The rule is well settled that in a suit at law all the plaintiffs must be entitled to recover, or the suit cannot be maintained. Accordingly, any matter that will negative the right of one of the partners to bring the suit is sufficient to defeat an action upon a firm claim, in which all the partners must be joined as plaintiffs.²⁴ If, for example, one partner has released a firm debt or entered into an accord and satisfaction, although he may have acted in fraud of his copartners, yet a suit at law cannot be maintained by the firm to recover such debt.²⁵ So, where one party has agreed with the acceptor of a bill to provide for its payment at maturity, no action lies by the firm against the acceptor.²⁶ If the rule were other-

²⁴ *Wallace v. Kelsall*, 7 Mees. & W. 264; *Jones v. Yates*, 9 Barn. & C. 532, 17 E. C. L. 241; *Richmond v. Heapy*, 1 Starkie, 202, 2 E. C. L. 83; *Johnson v. Peck*, 3 Starkie, 66, 3 E. C. L. 597; *Sparrow v. Chisman*, 9 Barn. & C. 241, 17 E. C. L. 115; *Cochran v. Cunningham's Ex'r*, 16 Ala. 448, 50 Am. Dec. 186; *Church v. First Nat. Bank*, 87 Ill. 68; *Blodgett v. Sleeper*, 67 Me. 499; *Myrick v. Dame*, 9 Cush. (Mass.) 248; *Homer v. Wood*, 11 Cush. (Mass.) 62; *Farley v. Lovell*, 103 Mass. 387; *Greeley v. Wyeth*, 10 N. H. 15; *Weaver v. Rogers*, 44 N. H. 112; *Craig v. Hulschizer*, 34 N. J. Law, 363; *Wells v. Mitchell*, 1 Ired. (N. C.) 484; *Cornells v. Stanhope*, 14 R. I. 97; *Estabrook v. Messersmith*, 18 Wis. 545; *Salmon v. Davis*, 4 Binn. (Pa.) 375, 5 Am. Dec. 410; *Bank of Arthur v. Ellars*, 48 Ill. App. 598.

²⁵ *Salmon v. Davis*, 4 Binn. (Pa.) 375, 5 Am. Dec. 410; *Myrick v. Dame*, 9 Cush. (Mass.) 248; *Wallace v. Kelsall*, 7 Mees. & W. 264; *Cochran v. Cunningham's Ex'r*, 16 Ala. 448, 50 Am. Dec. 184; *Biggs v. Lawrence*, 3 Term R. 454; *Jacaud v. French*, 12 East, 317.

²⁶ *Richmond v. Heapy*, 1 Starkie, 202, 2 E. C. L. 83; *Sparrow v. Chisman*, 9 Barn. & C. 241; *Johnson v. Peck*, 3 Starkie, 66, 3 E. C. L. 597.

wise, by the death of his copartners the disqualified partner might become entitled to sue alone, which would be an absurdity.²⁷ A person cannot be allowed, as a plaintiff in a court of law, to rescind his own act by joining his copartners with him.²⁸ Whatever relief can be obtained in this class of cases must be sought in a court of equity.²⁹

This doctrine has been applied to cases where one partner, for his own purposes, and in fraud of his copartners, has wrongfully disposed of firm property, and it has been held that no action at law will lie for the recovery of such property, because the guilty partner, as a joint plaintiff, would have to allege his own wrongdoing in order to recover.³⁰ But other courts take a contrary view, and hold that in such case the title to the property has not passed, because the partner was not acting within the scope of his authority, and that therefore the guilty partner is not seeking to rescind his own act, and it is

²⁷ *Wallace v. Kelsall*, 7 Mees. & W. 264. "The right of action being joint, if one of the coplaintiffs dies, the right then accrues to and vests in the survivor. A joint action does not abate by the death of one of the plaintiffs, nor are the rights of the parties at all changed or affected thereby in a court of law; so that, in the present case, if the innocent partner had died, Homer, the fraudulent partner, might maintain this action alone in his own name, and thus, for his own benefit, avoid his own act by proof of his own misconduct, and recover over again from the defendants the very debt which has once been paid to him, and from which he has discharged them in full." *Homer v. Wood*, 11 Cush. (Mass.) 65.

²⁸ *Sparrow v. Chisman*, 9 Barn. & C. 242; *Jones v. Yates*, 9 Barn. & C. 532; *Wallace v. Kelsall*, 7 Mees. & W. 273; *Homer v. Wood*, 11 Cush. (Mass.) 62; *Craig v. Hulschizer*, 34 N. J. Law, 363.

²⁹ *Church v. First Nat. Bank*, 87 Ill. 68; *Bank of Arthur v. Ellars*, 48 Ill. App. 598; *Cochran v. Cunningham's Ex'r*, 16 Ala. 448, 50 Am. Dec. 186; *Estabrook v. Messersmith*, 18 Wis. 545.

³⁰ *Blodgett v. Sleeper*, 67 Me. 499; *Farley v. Lovell*, 103 Mass. 387; *Homer v. Wood*, 11 Cush. (Mass.) 62; *Greeley v. Wyeth*, 10 N. H. 15; *Weaver v. Rogers*, 44 N. H. 112; *Craig v. Hulschizer*, 34 N. J. Law, 363; *Wells v. Mitchell*, 1 Ired. (N. C.) 484; *Cornells v. Stanhope*, 14 R. I. 97; *Estabrook v. Messersmith*, 18 Wis. 545; *Jones v. Yates*, 9 Barn. & C. 532. It is immaterial that the defendant and the guilty partner conspired together to defraud the other partners.

accordingly held that the action will lie.³¹ There is considerable confusion and conflict in the cases upon this point. Where however, a partner acting in the course of his authority commits a fraud upon a third person, it is clear that such fraud is a perfect defense to an action by the firm seeking to take advantage of the transaction.³²

It is conceded by all the authorities that the technical objection under consideration does not apply to actions against partners, and they may defend upon the ground that their co-partner had no authority to bind them.³³

ACTIONS AGAINST THE FIRM.

136. In actions upon a firm liability, all the partners should be joined as defendants except—

Exceptions—

(a) Dormant and nominal partners are proper, but not necessary, parties defendant.

Farley v. Lovell, 103 Mass. 387; *Grover v. Smith*, 165 Mass. 132, 42 N. E. 555. If a bank pays out the money of a partnership to one of the partners upon his check, in fraud of the rights of the other partners, an action at law cannot be maintained in the firm name against the bank, but resort must be had to a court of equity for the relief of those partners claiming to be injured. *Church v. First Nat. Bank*, 87 Ill. 68; *Bank of Arthur v. Ellars*, 42 Ill. App. 598.

³¹ *Rogers v. Batchelor*, 12 Pet. (U. S.) 221; *Burwell v. Springfield*, 15 Ala. 273; *Brewster v. Mott*, 5 Ill. 378; *Casey v. Carver*, 42 Ill. 225; *Daniel v. Daniel*, 9 B. Mon. (Ky.) 195; *Warder v. Newdigate*, 11 B. Mon. (Ky.) 174; *Johnson v. Crichton*, 56 Md. 108; *Minor v. Gaw*, 11 Smedes & M. (Miss.) 322; *Buck v. Mosley*, 24 Miss. 170; *Ackley v. Staehlin*, 56 Mo. 558; *Forney v. Adams*, 74 Mo. 138; *Billings v. Meigs*, 53 Barb. (N. Y.) 272; *Thomas v. Pennrich*, 28 Ohio St. 55; *Purdy v. Powers*, 6 Pa. 492; *Binns v. Waddill*, 32 Grat. (Va.) 588; *Dob v. Halsey*, 16 Johns. (N. Y.) 34; *Liberty Sav. Bank v. Campbell*, 75 Va. 534; *Viles v. Bangs*, 36 Wis. 131; *Cotzhausen v. Judd*, 43 Wis. 213, 28 Am. Rep. 539.

³² *Kilgore v. Bruce*, 166 Mass. 136, 44 N. E. 108.

³³ *Johnson v. Crichton*, 56 Md. 108. And see the authorities cited *supra*, this section.

- (b) Under statutes making partnership obligations joint and several, all or any of the partners may be sued
- (c) In an action for a firm tort, the partners may be sued jointly or severally.
- (d) When a contract is made in the name of one partner, such partner may or must be sued alone in the same cases that any other agent may or must be sued alone upon a contract made by him for his principal.

In the absence of statute, partnership contracts are joint, and therefore all partners should be joined in an action against them upon a firm contract.³⁴ An infant partner should be joined as a defendant.³⁵

Dormant partners may, but need not, be joined as parties defendant.³⁶ A nominal partner is ordinarily a proper, but not a necessary, party defendant.³⁷ Under statutes making partnership obligations joint and several, the action may be brought against any one or all of the partners, at plaintiff's option.

³⁴ *Page v. Brant*, 18 Ill. 37; *Sandusky v. Sidwell*, 173 Ill. 493, 50 N. E. 1003; *Smith v. Canfield*, 8 Mich. 493; *Le Page v. McCrea*, 1 Wend. (N. Y.) 164; *Weil v. Guerin*, 42 Ohio St. 299.

"While each partner is liable in solido for all debts of the firm, one partner cannot be sued alone, unless he has by some act rendered himself severally liable; and each partner has a right to require all who are jointly liable with him to be made parties to a suit upon any partnership liability." *Cox v. Gille Hardware & Iron Co.*, 8 Okl. 483, 58 Pac. 645.

³⁵ *Bethel v. Judge of Superior Court*, 57 Mich. 379, 24 N. W. 112; *Mason v. Denison*, 15 Wend. (N. Y.) 64; *Slocum v. Hooker*, 13 Barb. (N. Y.) 536.

³⁶ *Page v. Brant*, 18 Ill. 37; *Wright v. Herrick*, 125 Mass. 154; *Bishop v. Austin*, 66 Mich. 515, 33 N. W. 525; *Richardson v. Farmer*, 36 Mo. 35; *New York Dry Dock Co. v. Treadwell*, 19 Wend. (N. Y.) 525; *Galway v. Nordinger*, 21 N. Y. St. Rep. 197; *Brown v. Birdsell*, 29 Barb. (N. Y.) 549; *Arnold v. Morris*, 7 Daly (N. Y.) 498; *Scott v. Conway*, 58 N. Y. 619.

³⁷ *Dickinson v. Valpy*, 10 Barn. & C. 140; *Wood v. Culen*, 13 Minn.

In an action for a firm tort, the partners may be sued either jointly or severally.³⁸ This is true, whether the tort was committed by an agent or servant of the firm in the course of his employment,³⁹ or by one of the partners acting within the scope of the partnership business.⁴⁰ A distinction has been asserted in the case of torts arising from the state of the partnership lands, and it has been said that in such case all the partners must be sued jointly.⁴¹

One partner may or must be sued alone on contracts made by him on behalf of the firm in the same cases in which an agent may or must be sued on contracts made by him on behalf of his principal.⁴² An agent, and therefore a partner, must be sued alone upon a contract under seal made in his own name, it being a rule of the common law that the person to be sued for breach of a contract by deed is the person by whom the contract is expressed by the deed to be made. Parol evidence is inadmissible to charge other persons.⁴³ So, where an agent or partner draws, indorses, or accepts a bill of exchange in his own name, he must be sued thereon alone.⁴⁴

394; *Perry v. Randolph*, 6 Smedes & M. (Miss.) 335. Compare *Hatch v. Wood*, 43 N. H. 633; *Purvis v. Butler*, 87 Mich. 248, 49 N. W. 564.

³⁸ See *Stevens v. Faucet*, 24 Ill. 483; *Roberts v. Johnson*, 58 N. Y. 613; *Hutton v. Murphy*, 9 Misc. 151, 29 N. Y. Supp. 70; *Hyrne v. Erwin*, 23 S. C. 226; *Fletcher v. Ingram*, 46 Wis. 191, 54 N. W. 424.

³⁹ *Roberts v. Johnson*, 58 N. Y. 613; *Stockton v. Frey*, 4 Gill (Md.) 406; *Wood v. Luscomb*, 23 Wis. 287.

⁴⁰ *Stevens v. Faucet*, 24 Ill. 483; *Fletcher v. Ingram*, 46 Wis. 191, 54 N. W. 424; *Hyrne v. Erwin*, 23 S. C. 226.

⁴¹ *Lindl. Partn.* p. 283, citing *Mitchell v. Tarbutt*, 5 Term R. 649.

⁴² *Dicey, Parties*, p. 271.

⁴³ *Briggs v. Partridge*, 64 N. Y. 357; *Spencer v. Field*, 10 Wend. 87. *Home Library Ass'n v. Witherow*, 50 Ill. App. 117; *Priestly v. Fernie*, 3 Hurl. & C. 977; *Appleton v. Binks*, 5 East, 148; *Firemen's Ins. Co. v. Floss*, 67 Md. 403, 10 Atl. 139; *Ward v. Motter*, 2 Rob. (Va.) 536; *Brown's Adm'r v. Johnson*, 13 Grat. (Va.) 651; *Galt's Ex'r v. Calland's Ex'r*, 7 Leigh (Va.) 594.

⁴⁴ *Dicey, Parties*, p. 252; *Leadbitter v. Farrow*, 5 Maule & S. 345; *Sowerby v. Butcher*, 2 Crompt. & M. 368; *Pentz v. Stanton*, 10 Wend.

Where the principal's name does not appear upon a bill or note, he is not liable thereon as a party to the instrument.⁴⁵ Where the person dealing with one partner gives credit to him exclusively, with knowledge that such partner is acting for his firm, such partner may and must be sued alone.⁴⁶ Where a partner so contracts as to bind himself personally as well as his firm, he may be sued alone thereon, or all the partners may be sued jointly.⁴⁷ Where the partner contracting was the only known principal, but the contract was in fact made for the benefit of the firm, it being the undisclosed principal, the other contracting party has an option to sue such partner alone, or to sue all the partners jointly.⁴⁸

ACTIONS BETWEEN PARTNERS.

137. No action at law lies between partners to enforce an obligation between the firm and a partner except—
Exceptions—This rule has been held not to apply in the following cases:

(a) Where the partnership was for a single completed transaction.

(N. Y.) 276; *Williams v. Robbins*, 16 Gray (Mass.) 77; *Bickford v. First Nat. Bank*, 42 Ill. 238; *Anderton v. Shoup*, 17 Ohio St. 125; *Moss v. Livingston*, 4 N. Y. 208; *Prentiss v. Foster*, 28 Vt. 742; *Ward v. Motter*, 2 R. (Va.) 555; *Eastwood v. Bain*, 3 Hurl. & N. 733.

⁴⁵ Dicey, *Parties*, p. 253.

⁴⁶ Dicey, *Parties*, p. 253, citing *Addison v. Gandassequi*, 4 Taunt. 573, 2 Smith, Lead. Cas. (8th ed.) 392, and *Thomson v. Davenport*, 9 Barn. & C. 78, 2 Smith, Lead. Cas. (8th ed.) 398. See, also, *Gates v. Watson*, 54 Mo. 585; *Clark v. Amoskeag Mfg. Co.*, 62 N. H. 612; *Watt v. Kirby*, 15 Ill. 200.

⁴⁷ Dicey, *Parties*, p. 254, citing *Williamson v. Barton*, 31 L. J. Exch. 174, per Branwell, B.

⁴⁸ Dicey, *Parties*, p. 256; *Leslie v. Wiley*, 47 N. Y. 648; *Woodhouse v. Duncan*, 106 N. Y. 533, 534, 13 N. E. 334; *Hagar v. Stone*, 20 Vt. 106; *Syvester v. Smith*, 9 Mass. 119; *Cowles v. Robinson*, 11 Colo. 587.

- (b) Where there is but a single unadjusted item of accounts.
- (c) Where the action is to recover a final balance after termination of the partnership.

It is a well-settled rule that no action will lie in favor of one partner against his copartner upon a demand of the firm against such partner, or upon a liability of the firm to a partner.⁴⁹ The reason usually given for this rule is that, as partnerships rights and liabilities are joint, a partner would have to be joined both as plaintiff and as defendant and would thus be suing himself, which would be an anomaly.⁵⁰ The real reason for the rule is that, until an accounting and settlement of the partnership affairs is had, there is no cause of action between partners arising out of the partnership transactions, except an equitable action for an accounting. The relation of debtor and creditor does not exist between partners or their representatives until the partnership affairs are wound up and a balance struck.⁵¹ The only promise implied by law from firm transactions is to pay the amount which may

⁴⁹ *Duff v. Maguire*, 99 Mass. 300; *Haskell v. Adams*, 7 Pick. (Mass.) 59; *Carpenter v. Greenop*, 74 Mich. 664, 42 N. W. 276, *Mechem's Cases*, 242; *Hemenway v. Burnham*, 90 Mich. 227, 51 N. W. 276; *Englis v. Furniss*, 4 E. D. Smith (N. Y.) 587; *Ferguson v. Baker*, 116 N. Y. 257, 22 N. E. 400; *Newby v. Harrell*, 99 N. C. 149, 5 S. E. 284, *Burdick's Cases*, 543; *Graham v. Holt*, 3 Ired. (N. C.) 300.

⁵⁰ See *Bracken v. Kennedy*, 4 Ill. 558; *Page v. Thompson*, 33 Ind. 137; *Cooper v. Nelson*, 38 Iowa, 442; *Warren v. Stearns*, 19 Pick. (Mass.) 73; *Mitchell v. Wells*, 54 Mich. 127, 19 N. W. 777; *Burley v. Harris*, 8 N. H. 233.

⁵¹ *Cole v. Fowler*, 68 Conn. 450, 36 Atl. 807; *Martin v. Stubbings*, 20 Ill. App. 381; *Russell v. Minnesota Outfit*, 1 Minn. 164; *Ross v. Carson*, 32 Mo. App. 148; *Willis v. Barron*, 143 Mo. 450, 45 S. W. 289; *Towle v. Meserve*, 38 N. H. 9; *Wells v. Mitchell*, 1 Ired. (N. C.) 484; *Ives v. Miller*, 19 Barb. (N. Y.) 196. "Until such final settlement, the general rule is that the firm, and not the individual partner, is the debtor; and in such case it cannot be said correctly that there is a debt from one partner to the other." *Sprout v. Crowley*,

be found due after an accounting, and it follows that no cause of action can exist before such accounting.⁵²

A private statement of account between the parties is sufficient, and it has been deemed immaterial in such case that partnership affairs with third persons were unsettled,^{52a} and a sale by one partner to the other of all his interest is a virtual accounting.^{52b}

The common-law action of account or account rendered will lie between partners, but this remedy has been practically superseded by a bill in equity for an account.

Exceptions to Rule.

The rule that no action at law lies between partners upon partnership transactions has been held not to apply to a partnership for a single completed transaction.⁵³ Nor to cases where there is a single unadjusted item of account.⁵⁴ In Massachusetts, an action at law may be maintained to recover a final balance after the termination of the partnership in all cases where the recovery will effect a final settlement between the partners.⁵⁵

20 Wis. 191; citing *Ives v. Miller*, 19 Barb. (N. Y.) 196, and cases cited.

⁵² *Mickle v. Peet*, 43 Conn. 66; *Bank of British North America v. Delafield*, 126 N. Y. 410, 27 N. E. 797; *Crater v. Bininger*, 45 N. Y. 545.

^{52a} *McDowell v. North*, 24 Ind. App. 435, 55 N. E. 789. And see *Burns v. Nottingham*, 60 Ill.

^{52b} *Schlicher v. Vogel*, 59 N. J. Eq. 351, 47 Atl. 448; *Cobb v. Benedict*, 27 Colo. 342, 62 Pac. 222.

⁵³ *Myers v. Winn*, 16 Ill. 135; *Lawrence v. Clark*, 9 Dana (Ky.) 257; *Rankin v. Fairley*, 29 Mo. App. 587; *Kutz v. Drelbelbis*, 126 Pa. 335, 17 Atl. 609; *Meason v. Kaine*, 63 Pa. 335. Contra, *Attwater v. Fowler*, 1 Hall (N. Y.) 180; *Price v. Drew*, 18 Fla. 670.

⁵⁴ *Purvines v. Champion*, 67 Ill. 459; *Farwell v. Tyler*, 5 Iowa, 535; *Fanning v. Chadwick*, 3 Pick. (Mass.) 420; *Bambrick v. Simms*, 132 Mo. 49, 33 S. W. 445; *Byrd v. Fox*, 8 Mo. 574; *Arnold v. Arnold*, 90 N. Y. 583.

⁵⁵ *Starbuck v. Shaw*, 10 Gray (Mass.) 494; *Sikes v. Work*, 6 Gray

**SAME—ACTIONS BETWEEN FIRMS WITH A COMMON
MEMBER.**

138. No action at law lies between two firms with a common member.

The same reasons that prohibit actions at law between partners of the same firm forbid actions at law between two firms with a common member.⁵⁶ It has sometimes been held that such actions can be maintained under the Code, because the distinctions between actions at law and suits in equity have been abolished.⁵⁷ But it is believed that the better view is that, even in equity, or under the Code, the only action that can be maintained between firms with a common member, or between partners of the same firm, is an action for an accounting.⁵⁸

(Mass.) 434; *Bond v. Hays*, 12 Mass. 34; *Capen v. Barrows*, 1 Gray (Mass.) 376; *Shattuck v. Lawson*, 10 Gray (Mass.) 405.

⁵⁶ *Hall v. Kimball*, 77 Ill. 161; *Haven v. Wakefield*, 39 Ill. 509; *Crosby v. Timolat*, 50 Minn. 171, 52 N. W. 526; *Taylor v. Thompson*, 176 N. Y. 168, 68 N. E. 240; *Beacannon v. Liebe*, 11 Or. 448, 5 Pac. 273; *Rogers v. Rogers*, 5 Ired. Eq. (N. C.) 31; *Tassey v. Church*, 6 Watts & S. (Pa.) 467.

⁵⁷ *Cole v. Reynolds*, 18 N. Y. 74; *Mangels v. Shaen*, 21 App. Div. 507, 48 N. Y. Supp. 526; *Schnafer v. Schmidt*, 59 Hun, 625, 13 N. Y. Supp. 725, affirmed 128 N. Y. 683, 26 N. E. 149; *Beacannon v. Liebe*, 11 Or. 445, 5 Pac. 273.

⁵⁸ *Page v. Thompson*, 33 Ind. 137; *Russell v. Minnesota Outfit*, 1 Minn. 162; *Crosby v. Timolat*, 50 Minn. 171, 52 N. W. 526; *Englis v. Furniss*, 4 E. D. Smith (N. Y.) 587; *Rogers v. Rogers*, 5 Ired. Eq. (N. C.) 31. In Pennsylvania, it is expressly provided by statute that actions at law may be maintained between firms having a common member, but even this statute has not removed the inherent objection to such suits, nor obliterated the necessity of an accounting. See *Tassey v. Church*, 6 Watts & S. (Pa.) 465; *Pennock v. Swayne*, 6 Watts & S. (Pa.) 239; *Allen v. Erie City Bank*, 57 Pa. 140.

SAME—ACTIONS ON INDIVIDUAL OBLIGATIONS.

139. An action at law will lie between partners upon individual obligations.

The rule forbidding actions between partners upon firm transactions has no application, of course, to cases where the right and liabilities sought to be enforced are not firm rights and liabilities, but are the individual rights and liabilities of the partners. The mere fact that the transaction is in some way connected with the partnership does not constitute it a partnership transaction, within the meaning of the rule. After a final settlement and ascertainment of a balance, the rights and liabilities thereunder are individual rights and liabilities, and a partner may maintain an action at law against his copartner to recover his share.⁵⁹ Actions at law may be maintained upon individual contracts made between the partners either before, after, or during the existence of the partnership.⁶⁰

⁵⁹ *Purvines v. Champion*, 67 Ill. 459; *Thompson v. Smith*, 82 Iowa, 598, 48 N. W. 988; *Miner v. Lorman*, 59 Mich. 480, 26 N. W. 678; *Bambrick v. Simms*, 132 Mo. 48, 33 S. W. 445; *Arnold v. Arnold*, 90 N. Y. 583; *Blanchard v. Jefferson*, 13 App. Div. 314, 43 N. Y. Supp. 152; *Rose v. Bradley*, 91 Wis. 619, 65 N. W. 509.

⁶⁰ *Penn v. Stone*, 10 Ala. 209; *Wells v. Carpenter*, 65 Ill. 447; *Berry v. DeBruyn*, 77 Ill. App. 359; *Douthit v. Douthit*, 133 Ind. 26; *Williams v. Henshaw*, 11 Pick. (Mass.) 79; *Ryder v. Wilcox*, 103 Mass. 24, *Burdick's Cases*, 525; *Kinney v. Robison*, 52 Mich. 389, 18 N. W. 120; *Crater v. Bininger*, 45 N. Y. 545; *Bank of British North America v. Delafield*, 126 N. Y. 410, 27 N. E. 797. Thus, an action lies for fraud in inducing the plaintiff to enter into partnership with the defendant. *Hale v. Wilson*, 113 Mass. 444; *Rice v. Culver*, 32 N. J. Eq. 601; *More v. Rand*, 60 N. Y. 208. Or to recover money paid under an executory agreement to form a partnership which has been broken. *Lampert v. Ravid*, 33 Misc. 115, 67 N. Y. Supp. 82. A partner may maintain an action at law against his former co-partner to recover price of his interest, sold to the latter.

Liability of one partner to another for breach of the partnership agreement is not an individual indebtedness within this rule,^{60a} but breach of an agreement to form a partnership is.^{60b} Nor is the claim of a partner to contribution or indemnity for money advanced for firm purposes ordinarily deemed individual,^{60c} but one partner may advance the share of an-

Burney v. Boone, 32 Ala. 486; Edens v. Williams, 36 Ill. 252. An action at law lies for breach of an agreement to enter into partnership with the plaintiff. Hill v. Palmer, 56 Wis. 123, 14 N. W. 123, Mechem's Cases, 249. An action at law lies for a wrongful dissolution of a partnership in breach of the partnership agreement. Jewett v. Brooks, 184 Mass. 505; Bagley v. Smith, 10 N. Y. 489; Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291. An action lies upon a promissory note between partners as individuals. Berry v. DeBruyn, 77 Ill. App. 359; Mitchell v. Wells, 4 Mich. 127; First Nat. Bank v. Wood, 128 N. Y. 35, 27 N. E. 1020. "One partner may sue another on a note given to him for a sufficient consideration though growing out of partnership business." Hey v. Harding (Ky.), 53 S. W. 33. An action at law lies to recover money advanced to launch the partnership. Bull v. Coe, 77 Cal. 54, 18 Pac. 808; Wright v. Eastman, 44 Me. 220; Wetherbee v. Potter, 99 Mass. 354; Bates v. Lane, 62 Mich. 132, 28 N. W. 753; Smith v. Kemp, 92 Mich. 357, 52 N. W. 639; Gordon v. Boppe, 55 N. Y. 665. Partners may, by express agreement, separate a particular transaction from the firm accounts, and transform it into individual rights and liabilities, whereon an action at law will lie. Stone v. Aldrich, 43 N. H. 53; Ryder v. Wilcox, 103 Mass. 24, Burdick's Cases, 525; Harris v. Harris, 39 N. H. 52; Emery v. Wilson, 79 N. Y. 78. One partner may sue his copartner at law to recover damages for individual losses suffered by him from the latter's tort. Newsom v. Pitman, 98 Ala. 526, 12 So. 412; Sweet v. Morrison, 103 N. Y. 235, 8 N. E. 396. Where a partner agreed in the articles of partnership to pay an equivalent for certain services to be rendered in the business by the others and afterwards adjusted the amount, and expressly promised to pay it, it was held that an action at law lay upon the promise. Paine v. Thacher, 25 Wend. (N. Y.) 450.

^{60a} Miller v. Freeman, 111 Ga. 654, 36 S. E. 961.

^{60b} Tevis v. Carter, 23 Ky. L. R. 1270, 65 S. W. 17; Lampert v. Ravid, 33 Misc. 115, 67 N. Y. Supp. 82; Buckmaster v. Gowen, 81 Ill. 153.

^{60c} Sebastian v. Booneville Academy Co., 22 Ky. L. R. 186, 56 S. W. 810; Worley v. Smith, 26 Tex. Civ. App. 270, 63 S. W. 903.

other under such circumstances that it is to be deemed an individual loan which may be sued on at law during the continuance of the partnership.^{60d}

SUITS IN EQUITY.

- 140. As a general rule, the remedy between partners, until final settlement of accounts, is exclusively in equity.
- 141. The granting of equitable remedies in suits between partners is governed by ordinary considerations.

The jurisdiction of equity over controversies between partners depends, as in other cases, upon the absence of an adequate remedy at law; but owing to the intimate and complicated nature of the partnership relation, the remedy at law is seldom adequate, and consequently the jurisdiction over partnership controversies is almost exclusively in equity.⁶¹ As has been seen, it is only in exceptional cases that an action at law will lie between partners upon a partnership transaction.

The equity jurisdiction is most frequently invoked to secure a dissolution, accounting and settlement of the affairs of the firm.

The granting of equitable remedies, such as injunction, specific performance, and the appointment of receivers, is in the main governed by general considerations not peculiar to partnership; but there are three rules governing the action of a court of equity in this regard which must be noticed.

The first rule is that equity will not undertake the management of a going concern. Formerly the rule was very strictly

^{60d} *Farmer v. Putnam*, 35 Misc. 32, 70 N. Y. Supp. 179.

⁶¹ *Mudd v. Bates*, 73 Ill. App. 576; *Wycoff v. Purnell*, 10 Iowa, 332, *Mechem's Cases*, 238; *Course v. Prince*, 1 Mill (S. C.) 413; *Knowlton v. Reed*, 38 Me. 246; *Blackwell v. Rankin*, 7 N. J. Eq. 162; *Cunningham v. Littlefield*, 1 Edw. Ch. (N. Y.) 104.

enforced that a court of equity would not interfere at all unless a dissolution was sought or had already taken place. Thus, under the old rule, if a dissolution was not sought, the court would not decree a partnership account, nor restrain a partner from infringing the partnership articles. This rule has been much relaxed in modern practice, but even now a court will not take the management of a going concern into its own hands.⁶² There are many cases now in which an injunction,⁶³ or an account⁶⁴ will be decreed, although no dissolution has taken place, and none is sought.

The second rule above mentioned is that a court of equity will not interfere in matters of merely internal regulation.

The third rule is that equity will not interfere at the instance of a person who has been guilty of *laches*. This is a general principle, applicable to all suits in equity, but there is a peculiar propriety in enforcing it in partnership cases. Especially where the alleged partnership was in a speculative

⁶² Lindl. Partn. p. 465 et seq.; England v. Curling, 8 Beav. 129, 19 Eng. Rul. Cas. 598; Roberts v. Eberhardt, Kay, 148, 19 Eng. Rul. Cas. 607. Where tenants in common of a mine have been working it in partnership, or where the mine itself is the partnership property, the court will not appoint a receiver or manager at the instance of one of the partners, in a suit which does not seek to dissolve the partnership. Roberts v. Eberhardt, Kay, 148, 23 L. J. Ch. 201, 19 Eng. Rul. Cas. 607.

⁶³ Pirtle v. Penn, 3 Dana (Ky.) 247, 28 Am. Dec. 70, Mechem's Cases, 259; Van Kuren v. Trenton Locomotive & Machine Mfg. Co., 13 N. J. Eq. 302.

⁶⁴ An account may be had without a dissolution in the following cases: (1) Where one partner has sought to withhold from his copartner the profit arising from some secret transaction. (2) Where the partnership is for a term of years, still unexpired, and one partner has sought to exclude or expel his copartner, or drive him to a dissolution. (3) Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all. (4) Where there is an agreement for periodical accountings, or accountings as to distinct transactions. Lindl. Partn. p. 495; George, Partn. p. 337; Pat-

venture, a person will not be permitted to lie idly by until it has proven successful, and then claim a partner's share.⁶⁵

Specific Performance.

It is a general rule that equity will not decree specific performance of an agreement to enter into and carry on a partnership.⁶⁶ "It is impossible to make persons who will not concur carry on a business, jointly, for their own common advantage."⁶⁷

Where no fixed term of duration is provided for in the partnership agreement, a decree of specific performance would be nugatory, for the partners could at once dissolve it. Accordingly, in such cases, specific performance will not generally be decreed.⁶⁸

terson v. Ware, 10 Ala. 444; Traphagen v. Burt, 67 N. Y. 30; Wadley v. Jones, 55 Ga. 329.

⁶⁵ See, generally, Hoyt v. Sprague, 103 U. S. 613; Groenendyke v. v. Coffeen, 109 Ill. 325; Norway v. Rowe, 19 Ves. 144; Clegg v. Edmonson, 8 De Gex, M. & G. 787. In a business of a highly speculative character, a partner who stands by and takes no decided step for assertion of his rights will not be allowed, after a considerable period, and when the success of the venture is assured by the exertions of the remaining partners, to claim his share of profits as a partner. Norway v. Rowe, 19 Ves. 144, 19 Eng. Rul. Cas. 556; Rule v. Jewell, 18 Ch. Div. 660, 29 Weekly Rep. 755, 19 Eng. Rul. Cas. 561.

⁶⁶ Scott v. Raymen, L. R. 7 Eq. 112.

⁶⁷ England v. Curling, 8 Beav. 138, 19 Eng. Rul. Cas. 604. See, also, Satterthwait v. Marshall, 4 Del. Ch. 337, 354; Reed v. Vidal, 5 Rich. Eq. (S. C.) 289; Meason v. Kaine, 63 Pa. 335. In Buck v. Smith, 29 Mich. 166, the court said (at page 171): "It is extremely plain that the court cannot assume to enforce the performance of daily prospective duties, or supervise or direct in advance the course or conduct of one who is to control and manage in the interest of a firm in which he is to stand as a member, and where, too, the stipulated arrangement, as plainly set forth, contemplates that his personal skill and judgment shall be applied and govern according to the shifting needs of property and business. No court is competent to execute such an arrangement."

⁶⁸ Morris v. Peckham, 51 Conn. 128; Somerby v. Buntin, 118 Mass.

The court may decree specific performance of an agreement to execute a formal instrument of partnership, and, so far as it can make its jurisdiction effective, by injunction or otherwise, will give relief in substantially carrying out the agreement.⁶⁹ Thus, where it is necessary in order to secure to a partner the interests in property to which, by the partnership agreement, he is entitled, specific performance to that extent may be decreed, even of an agreement to form a partnership at will.⁷⁰ And, in general, an agreement to convey property rights with which the partnership is to deal, or land on which the partnership buildings are to be erected, will be specifically enforced where the agreement has been relied and acted on.

279, 287; *Buck v. Smith*, 29 Mich. 166. See, however, *Tillar v. Cook*, 77 Va. 477, 481.

⁶⁹ *England v. Curling*, 8 Beav. 129, 19 Eng. Rul. Cas. 598; *Roberts v. Eberhardt*, Kay, 148, 19 Eng. Rul. Cas. 607. "But if the parties insist on having a declaration of their rights, the court has, over and over again, entertained the jurisdiction, and must entertain the jurisdiction, unless some one or two of several partners are to be permitted to do just as they like with the partnership rights and interest." *England v. Curling*, 8 Beav. 138, 19 Eng. Rul. Cas. 605.

⁷⁰ *Somerby v. Buntin*, 118 Mass. 279; *Whitworth v. Harris*, 40 Miss. 483.

CHAPTER XI.

DISSOLUTION.

- 142. How Effected.
- 143. By Operation of Law.
- 144. By Act of Parties.
- 145. By Decree of Court.
- 146. Grounds for Dissolution.
- 147. Rights, Powers, and Liabilities after Dissolution.
- 148. Of Partners Generally.
- 149. Of Liquidating Partners.
- 150. Of surviving partners.
- 151-152. Of Estate of Deceased Partner.
- 153. Of Creditors.

HOW EFFECTED.

142. A partnership may be dissolved in three ways, viz.—
- (a) By operation of law.
 - (b) By act of parties.
 - (c) By decree of court.

SAME—BY OPERATION OF LAW.

143. A partnership is dissolved by operation of law upon the happening of either of the following events;
- (a) Death of partner.
 - (b) Insolvency or bankruptcy of partner or firm.
 - (c) Marriage of feme sole partner, except where her disabilities have been removed by statute.
 - (d) Events rendering continuance of partnership illegal.

Death of a Partner.

Whether a partnership is formed to continue for a definite term or not, the death of one partner, *ipso facto*, dissolves the partnership by operation of law as to all the partners.¹ It is not unusual to provide in the original articles or otherwise for a continuance of the partnership business, and in such case it is sometimes loosely said that the death of a partner does not dissolve the partnership.² But this is inaccurate. If the business is carried on under such arrangement, there is in effect and in law a new partnership.³

¹ Pitkin v. Pitkin, 7 Conn. 307; Remick v. Emtg, 42 Ill. 342; Nelson v. Hayner, 66 Ill. 487; Oliver v. Forrester, 96 Ill. 315; Dyer v. Clark, 5 Metc. (Mass.) 562, Ames' Cas. 251; Ames v. Downing, 1 Bradf. (N. Y.) 321; Dexter v. Dexter, 43 N. Y. App. Div. 268, 60 N. Y. Supp. 371; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163; Durant v. Pierson, 124 N. Y. 444, 26 N. E. 1095, Mechem's Cases, 403; Egberts v. Wood, 3 Paige Ch. (N. Y.) 517; Griswold v. Waddington, 15 Johns. (N. Y.) 57, Burdick's Cases, 544; Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872; Roberts v. Kelsey, 38 Mich. 602; Exchange Bank v. Tracy, 77 Mo. 594; Crawshay v. Maule, 1 Swanst. 520, 19 Eng. Rul. Cas. 476; Ex parte Ruffin, 6 Ves. 119, Burdick's Cases, 192, 19 Eng. Rul. Cas. 628.

² Butler v. American Toy Co., 46 Conn. 136; Duffield v. Brainard, 45 Conn. 424; Rand v. Wright, 141 Ind. 226, 39 N. E. 447, Burdick's Cases, 266; Roberts v. Kelsey, 38 Mich. 602; Jenness v. Carleton, 40 Mich. 343; Blodgett v. American Nat. Bank, 49 Conn. 9; Edwards v. Thomas, 66 Mo. 468; Wild v. Davenport, 48 N. J. Law, 129, 7 Atl. 295. See Bates, Partn. § 598 et seq. See, also, expressions of rule in cases cited in preceding note. In Wild v. Davenport, 48 N. J. Law, 129, 7 Atl. 295, the court say, at page 136: "A provision in articles of partnership that, on the death of a partner, his executor or personal representative, or some other person, shall be entitled to the place of a deceased partner in the firm, with the capital of the deceased in the firm business, or some part of it, is binding upon the surviving partner to admit the executor, personal representative, or nominee of the deceased partner, but does not bind the latter to come in. They have an option to come in or not, and a reasonable time within which to elect." To the same effect are Berry v. Folkes, 60 Miss. 576; Edgar v. Cook, 4 Ala. 588.

³ Hoard v. Clum, 31 Minn. 186, 17 N. W. 275; Mattison v. Farnham,

Insolvency or Bankruptcy.

Technical insolvency or bankruptcy of either an individual partner or of the firm, as distinguished from a mere inability to pay debts, works a dissolution of the partnership by operation of law; and an assignment for the benefit of creditors has the same effect.⁴ It has been held that a compromise with creditors and continuation of business after a general assignment prevents dissolution,^{4a} though it would be more accurate to consider such an arrangement as the formation of a new partnership.^{4b}

Marriage of Female Partner.

At common law, the marriage of a female partner operated as a dissolution, but under statutes authorizing married women to contract and hold property as if sole, marriage does not have this effect.⁵ A partnership between a man and a woman is dissolved by their marriage to each other.⁶

44 Minn. 95, 46 N. W. 347; Wilcox v. Derickson, 168 Pa. 331, 31 Atl. 1080.

⁴ McNutt v. King, 59 Ala. 597; Wells v. Ellis, 68 Cal. 243; Gordon v. Freeman, 11 Ill. 14; Talcott v. Dudley, 4 Scam. (Ill.) 427; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Eustis v. Bolles, 146 Mass. 413, 4 Am. St. Rep. 327; Atwood v. Gillett, 2 Doug. (Mich.) 206; Halsey v. Norton, 45 Miss. 703, 7 Am. Rep. 745; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Welles v. March, 30 N. Y. 344; Havens v. Hussey, 5 Paige, Ch. (N. Y.) 30; Siegel v. Chidsey, 28 Pa. 297; McKelvy's Appeal, 72 Pa. 409; Ex parte Ruffin, 6 Ves. 126, 19 Eng. Rul. Cas. 628. By an adjudication in bankruptcy, the partner becomes *civilliter mortuus* so far as the partnership is concerned. Talcott v. Dudley, 4 Scam. (Ill.) 427.

^{4a} Taylor v. Hotchkiss, 81 App. Div. 470, 80 N. Y. Supp. 1042.

^{4b} Atwood v. Gillett, 2 Doug. (Mich.) 206.

⁵ Brown v. Chancellor, 61 Tex. 437, 445. Query: Is notice of dissolution necessary? See Bates, Partn. § 538.

⁶ Bassett v. Shepardson, 52 Mich. 3, 17 N. W. 217, Burdick's Cases, 553. But see Burney v. Savannah Grocery Co., 98 Ga. 711, 25 S. E. 915, Burdick's Cases, 11.

Business of Partnership Becoming Unlawful.

A partnership is in every case dissolved by the happening of an event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership.⁷ Thus, where the partners are residents of different countries, the breaking out of war between such countries operates as a dissolution.⁸

SAME—BY ACTS OF PARTIES.

144. A partnership may be dissolved by the act of some or all of the partners. It is so dissolved in the following cases, viz.:

- (a) Where the stipulated term has expired, or the object of the partnership has been accomplished.
- (b) Where the parties mutually agree to a dissolution.
- (c) Where one partner gives notice of dissolution.
- (d) Where there is a change in membership.
- (e) Where one partner's share has been transferred.

Expiration of Term or Accomplishment of Object.

Where a partnership is formed for a specified term, and that term has expired, the partnership is dissolved without any further action upon the part of the partners.⁹ Notice of dissolution is necessary to relieve the partners from liability for subsequent acts of their former partners, except in the case of persons having notice of the term.¹⁰ The partnership

⁷ Pollock, Partn. art. 1. See, also, *Esposito v. Bowden*, 7 El. & Bl. 763.

⁸ *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; *Burdick's Cases*, 544, 16 Johns. (N. Y.) 438; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137; *Woods v. Wilder*, 43 N. Y. 164; *Taylor v. Hutchison*, 25 Grat. (Va.) 536; *Matthews v. McStea*, 91 U. S. 7.

⁹ *Schlater v. Winpenny*, 75 Pa. 321; *Ex parte Ruffin*, 6 Ves. 126; *Burdick's Cases*, 192, 19 Eng. Rul. Cas. 628.

¹⁰ *Ketchum v. Clark*, 6 Johns. (N. Y.) 144; *Holt v. Simmons*, 16

may, of course, be continued after the expiration of the original term, by express or tacit agreement.¹¹

Where the partnership was for the accomplishment of some particular transaction or venture, upon the completion thereof the partnership is at an end.¹²

Dissolution by Mutual Consent.

By mutual consent of all the partners, a partnership may be dissolved at any time, whether it was formed for an indefinite time, or a fixed period.¹³ A specific agreement is not necessary to dissolve a partnership—words or acts implying an intention to dissolve are enough.¹⁴ Abandonment of the partnership business is evidence of dissolution.¹⁵ Where both parties refuse further to perform the partnership agreement,

Mo. App. 97. See, also, ante, § 120, "Notice of Dissolution." The expiration of a partnership by lapse of time revokes a power of attorney to conduct the business of the firm, as to one who had notice of the term. *Schlater v. Winpenny*, 75 Pa. 321.

¹¹ *Mifflin v. Smith*, 17 Serg. & R. (Pa.) 165.

¹² *Bank of Montreal v. Page*, 98 Ill. 109; *Spurck v. Leonard*, 9 Ill. App. 174; *Bohrer v. Drake*, 33 Minn. 408, 23 N. W. 840; *Jones v. Jones*, 18 Ohio Cir. Ct. 260, 10 Ohio Dec. 71; *Sims v. Smith*, 11 Rich. (S. C.) 565.

¹³ *Phelps v. State*, 109 Ga. 115, 34 S. E. 210; *Bank of Montreal v. Page*, 98 Ill. 109; *Richardson v. Gregory*, 126 Ill. 166, 18 N. E. 777; *Ligare v. Peacock*, 109 Ill. 94; *Wantling v. Howarth*, 65 Ill. App. 598; *Gould v. Banks*, 8 Wend. (N. Y.) 562; *Ex parte Ruffin*, 6 Ves. 119. *Burdick's Cases*, 192, 19 Eng. Rul. Cas. 628.

¹⁴ *Richardson v. Gregory*, 27 Ill. App. 621, wherein it was held that a dissolution is effected by merely ceasing to do business, and dividing the partnership property. Where it is agreed that one who is to furnish the capital is to have the right to withdraw the capital at any time on consent of another, the partnership is dissolved by such withdrawal. *Smith v. Vanderberg*, 46 Ill. 34. Loss of the whole capital of a partnership, where there has been no provision made for doing business on credit, works a dissolution of the partnership. *Van Ness v. Fisher*, 5 Lans. (N. Y.) 236.

¹⁵ *Spurck v. Leonard*, 9 Ill. App. 174; *Ligare v. Peacock*, 109 Ill. 94. Compare *First Nat. Bank v. Strait*, 75 Minn. 396, 78 N. W. 101.

the partnership is effectually dissolved.¹⁶ Dissolution may be shown by a sale of the whole property and business, although the stipulated term has not expired.¹⁷

Dissolution by Act of One Partner.

Where a partnership is formed, but no definite time is fixed for its continuance, it is a partnership at will, and any partner may dissolve it at his pleasure,¹⁸ by merely notifying his partners that the partnership between him and them is dissolved.¹⁹ A partnership for the accomplishment of certain definite objects, but not expressly specifying any time for its continuance, is not a partnership at will, within the meaning of this rule, but it is regarded as a partnership, to continue

A partnership is dissolved when it ceases to do the business for which it was organized. *Potter v. Tolbert*, 118 Mich. 486, 71 N. W. 849, *Burdick's Cases*, 367.

¹⁶ *Ligare v. Vanderburg*, 46 Ill. 34; *Appeal of Haeberly*, 191 Pa. 239, 43 Atl. 207; *Coggsell v. Coggsell* (N. J. Eq.), 40 Atl. 213; *In re Account of Wells*, 4 Lack. Leg. News (Pa.) 135.

¹⁸ *Howell v. Harvey*, 5 Ark. 270, *Mechem's Cases*, 354; *Lawrence v. Robinson*, 4 Colo. 567; *Blake v. Sweeting*, 121 Ill. 67, 12 N. E. 67; *Carlton v. Cummins*, 51 Ind. 478; *Whiting v. Leakin*, 66 Md. 255, 7 Atl. 688; *Fletcher v. Reed*, 131 Mass. 312, *Burdick's Cases*, 554; *Walker v. Whipple*, 58 Mich. 476, 25 N. W. 472; *Berry v. Folkes*, 60 Miss. 576; *McElvey v. Lewis*, 76 N. Y. 373; *McMahon v. McClernan*, 10 W. Va. 419; *Loorya v. Kupperman*, 25 Misc. 518, 54 N. Y. Supp. 1005; *Skinner v. Tinker*, 34 Barb. (N. Y.) 333; *Pine v. Ormsbee*, 2 Abb. Prac. (N. S.; N. Y.) 375; *Buck v. Smith*, 29 Mich. 166, *Mechem's Cases*, 266; *Crawshay v. Maule*, 1 Swanst. 508, 19 Eng. Rul. Cas. 473; *Featherstonhaugh v. Fenwick*, 17 Ves. 307, 19 Eng. Rul. Cas. 577; *Peacock v. Peacock*, 16 Ves. 49, 19 Eng. Rul. Cas. 549.

¹⁹ *Blake v. Sweeting*, 121 Ill. 67, 12 N. E. 67; *Avery v. Craig*, 173 Mass. 110, 53 N. E. 153; *Eagle v. Bucher*, 6 Ohio St. 295, 67 Am. Dec. 342; *Abbot v. Johnson*, 32 N. H. 9. A partnership is dissolved, unless equity can interfere, where one of the firm takes exclusive possession, and gives notice of dissolution to the others and the public. *Solomon v. Kirkwood*, 55 Mich. 256, 21 N. W. 336, *Burdick's Cases*, 554, *Mechem's Cases*, 361.

until its purpose is accomplished, or the impracticability thereof demonstrated.²⁰

Where the partnership is for a fixed term, the American authorities are by no means uniform as to whether one partner can effect a dissolution at will. That he cannot was clearly Judge Story's opinion, as appears from the following passage: "In cases where the partnership is by the agreement to endure for a limited period of time, the question whether it may, within the period, be dissolved by the mere act or will of one of the partners, without the consent of all the others, does not seem to be absolutely and definitely settled in our jurisprudence, although it would not seem, upon principle, to admit of any real doubt or difficulty. Whenever a stipulation is positively made that the partnership shall endure for a fixed period, or for a particular adventure or voyage, it would seem to be at once inequitable and injurious to permit any partner, at his mere pleasure, to violate his engagement, and thereby to jeopard, if not sacrifice, the whole objects of the partnership; for the success of the whole undertaking may depend upon the due accomplishment of the adventure or voyage, or the entire time may be required to put the partnership into beneficial operation. It is no answer to say that such a violation of the engagement may entitle the injured partners to a compensation in damages, for, independent of the delay and uncertainty attendant upon any such mode of redress, it is obvious that the remedy may be—nay, must be—in many cases utterly inadequate and unsatisfactory. If there be any real and just ground for the abandonment of the partnership, a court of equity is competent to administer suitable redress. But that is exceedingly different from the right of the partner, *sua sponte*, from mere caprice, or at his own pleasure, to dissolve the partnership. In

²⁰ *Burgess v. Badger*, 124 Ill. 288, 14 N. E. 850; *Pearce v. Ham*, 113 U. S. 585; *Walker v. Whipple*, 58 Mich. 476, 25 N. W. 472.

short, the opposite doctrine, although perhaps in some measure countenanced by the Roman Law, is founded upon reasons exceedingly artificial, if not indefensible."²¹ These views have been adopted by some courts.²² But the great weight of authority is to the effect that there is no such thing as an indissoluble partnership, and that, even where the partners have contracted for a definite term, any partner may of his own will dissolve the partnership, with or without cause, at any time.²³ Of course, if he should dissolve the partnership before the expiration of the agreed term, he would be liable in damages to his copartners for breach of contract,²⁴ unless he had a valid legal excuse for not performing his contract.²⁵ But the partnership would nevertheless be dissolved, whether rightfully so or not.²⁶ It is manifestly impractic-

²¹ Story, Partn. (7th Ed.) § 278.

²² *Smith v. Mulock*, 1 Rob. (N. Y.) 569, 1 Abb. Prac. (N. S.; N. Y.) 374; *Cole v. Moxley*, 12 W. Va. 730; *Hannaman v. Karrick*, 9 Utah, 236, 33 Pac. 1039; *Pearpoint v. Graham*, 4 Wash. C. C. 232, Fed. Cas. No. 10,877. See, also, *Hartman v. Woehr*, 18 N. J. Eq. 383. One partner cannot take forcible possession of the firm property, and thereby effect a dissolution of the partnership before expiration of the time specified in the agreement. *Hannaman v. Karrick*, 9 Utah, 236, 33 Pac. 1039.

²³ *Howell v. Harvey*, 5 Ark. 270, *Mechem's Cases*, 354; *Walker v. Whipple*, 58 Mich. 476, 25 N. W. 472; *Bagley v. Smith*, 10 N. Y. 489; 19 How. Prac. (N. Y.) 1; *Slemmer's Appeal*, 58 Pa. 168; *Kinloch v. Hamlin*, 2 Hill (S. C.) 19.

²⁴ *Blake v. Dorgan*, 1 G. Greene (Iowa) 537; *Monroe v. Conner*, 15 Me. 178; *Solomon v. Kirkwood*, 55 Mich. 256, 21 N. W. 336, *Burdick's Cases*, 554, *Mechem's Cases*, 361; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513; *Slemmer's Appeal*, 58 Pa. 168; *Mason v. Connell*, 1 Whart. (Pa.) 381. Loss of profits which plaintiff would have realized is a proper element of damage. *Bagley v. Smith*, 10 N. Y. 489, *Mechem's Cases*, 251.

²⁵ As to grounds for dissolution, see *infra*, § 146.

²⁶ In *Karrick v. Hannaman*, 168 U. S. 328, 335, Gray, J., thus states the prevailing American doctrine, though the court was not called upon to decide the point: "No partnership can efficiently or beneficially carry on its business without the mutual confidence and co-

able for a court to compel persons to become or remain partners who are unwilling to do so. Such a partnership could not be conducted with profit to those concerned, and would be certain to result in dissensions and litigation. As has been seen, a court of equity will not take charge of a going concern, and will not ordinarily decree specific performance of a contract of partnership.

Change in Membership.

"Each change of partners, whether by the addition of a new member, or the death or retirement of an old one, or the substitution of a new for an old member, is a dissolution as to all partners, and not merely as to the one who has retired or died, and whether by consent or previous agreement or otherwise, and if the business is continued, it is by a new partnership, whether the name be the same or not. No matter how numerous the changes without apparent break in the continuity of the business, at each change an existing firm dissolves, and a new one is formed."²⁷ A change in name

operation of all the partners. Even when, by the partnership articles they have covenanted with each other that the partnership shall continue for a certain period, the partnership may be dissolved at any time, at the will of any partner, so far as to put an end to the partnership relation, and to the authority of each partner to act for all, but rendering the partner who breaks his covenant liable to an action at law for damages, as in other cases of breaches of contract. . . . According to the authorities just cited, the only difference, so far as concerns the right of dissolution by one partner, between a partnership for an indefinite period and one for a specified term, is this: In the former case, the dissolution is no breach of the partnership agreement, and affords the other partner no ground of complaint. In the latter case, such a dissolution before the expiration of the time stipulated is a breach of the agreement, and, as such, to be compensated in damages. But in either case the action of one partner does actually dissolve the partnership."

²⁷ Bates, Partn. § 570. And see *Morss v. Gleason*, 64 N. Y. 204; *Peters v. McWilliams*, 78 Va. 567; *Ross v. Cornell*, 45 Cal. 133; *Mc-*

without any change in membership does not operate as a dissolution.²⁸

Transfer of Partner's Interest.

The transfer of one partner's interest, either by voluntary act or by sale under legal process, operates as a dissolution.²⁹ This rule is, of course, subject to the difference of opinion as to whether a partner can dissolve a partnership for a definite term by any voluntary act of himself alone.³⁰ A sale by one partner to his copartner is clearly a dissolution by mutual consent.³¹

SAME—BY DECREE OF COURT.

145. A court of equity has jurisdiction to decree the dissolution of a partnership, and will do so where sufficient cause exists.

Where a partnership is one at will, it is not necessary to resort to equity to obtain a dissolution, because, as has been

Call v. Moss, 112 Ill. 493; Blake v. Sweeting, 121 Ill. 67, 12 N. E. 67; Givins v. Berry, 21 Ky. L. R. 680, 52 S. W. 942.

²⁸ Billingsley v. Dawson, 27 Iowa, 210; Gill v. Ferris, 82 Mo. 156.

²⁹ Blaker v. Sands, 29 Kan. 587; Clark v. Carr, 45 Ill. App. 469; Freeman v. Hemenway, 75 Mo. App. 611; Renton v. Chaplain, 9 N. J. Eq. 62; Comstock v. Buchanan, 57 Barb. (N. Y.) 127; Mumford v. McKay, 8 Wend. (N. Y.) 442; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Wilson v. Waugh, 101 Pa. 233; Horton's Appeal, 13 Pa. 67; Power v. Kirk, 1 Pittsb. (Pa.) 510; Carter v. Rowland, 53 Tex. 540; Sanchez v. Goldfrank (Tex. Civ. App.), 27 S. W. 204; Bank v. Carrollton Railroad, 11 Wall. (U. S.) 624, Mechem's Cases, 147; Heath v. Sansom, 4 Barn. & Adol. 172; Carroll v. Evans, 27 Tex. 262. A sale and transfer of the interest which one partner has in a particular stock held by the firm does not operate as a dissolution. Comstock v. Buchanan, 57 Barb. (N. Y.) 127.

³⁰ See Ferrero v. Buhlmeier, 34 How. Prac. (N. Y.) 33.

³¹ Walker v. Davis, 59 Iowa, 103, 12 N. W. 798; Wiggin v. Goodwin, 63 Me. 389; Heath v. Sansom, 4 Barn. & Adol. 172. Compare Taft v. Buffum, 14 Pick. (Mass.) 322.

seen, such a partnership may be dissolved at any time by any partner by simply giving notice to that effect; but where the partnership is for a stipulated term, and a partner desires to dissolve it before the expiration of such term, it is the usual practice to resort to a court of equity for a decree of dissolution. This is because, conceding the power of one partner to dissolve such a partnership by his own act, he dissolves it at his peril, and must respond to his copartners in damages if he does so without just and legal cause. By resort to a court of equity, he avoids this risk, and the existence of cause for dissolution is determined in advance of actual dissolution. Of course such relief can be had only in equity, as a court of law has no jurisdiction of such matters. The mere fact that a partner may dissolve by giving notice to his copartner does not preclude a resort to a court of equity as a dissolution involves a settlement and accounting over which equity has plenary jurisdiction.³² The mere filing of a suit seeking dissolution and settlement of a partnership does not, *ipso facto* operate as a dissolution.³³

GROUND FOR DISSOLUTION.

146. A court of equity may dissolve a partnership for any of the following causes, viz.:

- (a) Fraud in formation of partnership.
- (b) Insanity of partner.
- (c) Hopelessness of success.
- (d) Misconduct of partner.

Fraud.

Where a partner has been led into a partnership by means of fraud and deceit, he may maintain a suit in equity for a

³² *Adams v. Shewalter*, 139 Ind. 178, 38 N. W. 607; *Babcock v. Hermance*, 48 N. Y. 683.

³³ *Bagnetto v. Bagnetto*, 51 La. Ann. 1200, 25 So. 987.

dissolution,³⁴ or he may maintain a suit to rescind the contract, and require his partner to place him in *statu quo*,³⁵ provided, of course, he has not ratified the contract after knowledge of the fraud.³⁶

Insanity.

Insanity of a partner does not, *ipso facto*, and by operation of law, work a dissolution of the partnership,³⁷ but it constitutes a sufficient ground to justify a court of equity in decreeing a dissolution,³⁸ though, where it is only temporary, a dissolution will be denied.³⁹

Hopelessness of Success.

Any circumstance which renders the continuance of the partnership, or the attainment of the common end with a view to which it was entered into, practically impossible, is sufficient to warrant a dissolution.⁴⁰ Where certain loss is

³⁴ *Oteri v. Scalzo*, 145 U. S. 578.

³⁵ *Lindl. Partn.* pp. 480, 482; *Richards v. Todd*, 127 Mass. 167; *Howell v. Harvey*, 5 Ark. 270, *Mechem's Cases*, 354; *Newbigging v. Adam*, 34 Ch. Div. 582; *Mycok v. Beatson*, 13 Ch. Div. 384; *Pillans v. Harkness*, Colles, 442; *Rawlins v. Wickham*, 1 Giff. 355, 3 DeGex & J. 304. Misconduct and mismanagement by a partner is not ground for a rescission where the partner was guilty of no fraud when the partnership agreement was made. *Hollister v. Simonson*, 36 App. Div. 63, 55 N. Y. Supp. 372.

³⁶ *St. John v. Hendrickson*, 81 Ind. 350.

³⁷ *Raymond v. Vaughn*, 128 Ill. 256, 21 N. E. 566, holding that even an adjudication of insanity, the appointment of a conservator, and commitment to an asylum does not operate as a dissolution. But see *Isler v. Baker*, 6 Humph. (Tenn.) 85.

³⁸ *Raymond v. Vaughn*, 128 Ill. 256, 21 N. E. 566; *Jurgens v. Ittman*, 47 La. Ann. 367, 16 So. 952, *Burdick's Cases*, 558; *Griswold v. Waddington*, 15 Johns. (N. Y.), 57, *Burdick's Cases*, 544; *Jones v. Noy*, 2 Mylne & K. 125; *Jones v. Lloyd*, L. R. 18 Eq. 265.

³⁹ *Raymond v. Vaughn*, 128 Ill. 256, 21 N. E. 566; *Kirby v. Carr*, 3 Younge & C. 185; *Whitwell v. Arthur*, 35 Beav. 140.

⁴⁰ *Lindl. Partn.* p. 575; *Jackson v. Deese*, 35 Ga. 84; *Moles v. O'Neill*, 23 N. J. Eq. 207; *Brown v. Hicks*, 8 Fed. 155; *Rosenstein v.*

the only result of going on, any partner is entitled to have the firm dissolved, even though the agreed term of its existence has not yet expired.⁴¹

Misconduct of Partner.

A court of equity will dissolve a partnership at the instance of a partner where a copartner so seriously misconducts himself as to render it practically impossible for his copartners to continue to act with him.⁴² "But it is not considered to be the duty of the court to enter into partnership squabbles, and it will not dissolve a partnership on the ground of the ill temper or misconduct of one or more of the partners, unless the others are in effect excluded from the concern, or unless the misconduct is of such a nature as to utterly destroy the mutual confidence which must subsist between partners if they are to continue to carry out their business together."⁴³ Excluding a partner from any voice in the management of the business, and disregard of his advice and wishes,⁴⁴ irreconcilable differences and personal ill-will between the partners rendering co-operation in the business impossible,⁴⁵ keep-

Burns, 41 Fed. 841, *Burdick's Cases*, 557; *Sebastian v. Booneville Academy Co.*, 22 Ky. L. R. 186, 56 S. W. 810.

⁴¹ *Jennings v. Baddeley*, 3 Kay & J. 78; *Willson v. Church*, 13 Ch. Div. 1; *Rosenstein v. Burns*, 41 Fed. 841; *Holladay v. Elliott*, 8 Or. 84.

⁴² *Moore v. Price*, 116 Ala. 247, 22 So. 531; *Cash v. Earnshaw*, 66 Ill. 402; *Gerard v. Gateau*, 84 Ill. 121; *Bishop v. Breckles*, Hoff. Ch. (N. Y.) 534; *Henn v. Walsh*, 2 Edw. Ch. (N. Y.) 129; *Berry v. Cross*, 3 Sandf. Ch. (N. Y.) 1; *Reiter v. Morton*, 96 Pa. 229; *Warner v. Lelsen*, 31 Wis. 169; *Rosenstein v. Burns*, 41 Fed. 841.

⁴³ *Lindl. Partn.* p. 580. See, also, *Anon.*, 2 Kay & J. 441; *Smith v. Jeyes*, 4 Beav. 503; *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Harrison v. Tennant*, 21 Beav. 482. An see cases cited in preceding note.

⁴⁴ *Einstein v. Schnebly*, 89 Fed. 540.

⁴⁵ *Philipp v. Von Raven*, 26 Misc. 552, 57 N. Y. Supp. 701; *Sutro v. Wagner*, 23 N. J. Eq. 388; *Baxter v. West*, 1 Drevy & S. 173; *Pease v. Hewitt*, 31 Beav. 22.

ing erroneous accounts, and not entering receipts,⁴⁶ refusal to meet on matters of business,⁴⁷ conveyance of partnership realty in payment of individual debts,⁴⁸ or breach of the partnership articles,⁴⁹ have been held sufficient to justify a dissolution, and where the misconduct of a partner is such as to disable him from carrying on the business for which the partnership was formed, it is of course sufficient ground for dissolution.^{49a}

A mere error in judgment, upon the part of a partner, causing loss to the firm,⁵⁰ or a want of courtesy on the part of a partner to customers of the firm,⁵¹ is not sufficient cause for a decree of dissolution.

A dissolution will not be granted upon the ground of misconduct at the instance of the partner guilty of the misconduct in question.⁵²

RIGHTS, POWERS, AND LIABILITIES AFTER DISSOLUTION.

147. The rights, powers, and liabilities of partners and creditors after dissolution will be considered, in the order named, with respect to those.

- (a) Of partners generally.
- (b) Of liquidating partners.
- (c) Of surviving partners.
- (d) Of estate of deceased partner.
- (e) Of creditors.

⁴⁶ *Cottle v. Leitch*, 35 Cal. 434; *Cheesman v. Price*, 35 Beav. 141.

⁴⁷ *De Berenger v. Hamel*, 7 Jar. & B. 25.

⁴⁸ *Hubbard v. Moore*, 67 Vt. 532, 32 Atl. 465.

⁴⁹ *Abbot v. Johnson*, 32 N. H. 9.

^{49a} Partnership was formed to do certain work for a third party, and one partner was guilty of misconduct for which he was discharged. *Lapenta v. Lettieri*, 72 Conn. 377, 44 Atl. 730.

⁵⁰ *Cash v. Earnshaw*, 66 Ill. 402.

⁵¹ *Gerard v. Gateau*, 84 Ill. 121, *Mechem's Cases*, 366.

⁵² *Gerard v. Gateau*, 84 Ill. 121, *Mechem's Cases*, 366; *Harrison v. Tennant*, 21 Beav. 493.

SAME—OF PARTNERS GENERALLY.

148. After dissolution, a partner's authority to bind his co-partner is limited to acts necessary or proper for the winding up of the partnership affairs.

After a dissolution, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but not finished at the time of the dissolution, but not otherwise.⁵³ In the absence of a different agreement between them, each partner has an equal right to the possession of firm assets, and is under an equal duty to apply them to the payment of firm debts.⁵⁴ Thus, after a dissolution, a partner can sell the partnership assets,⁵⁵

⁵³ *Heartt v. Walsh*, 75 Ill. 200; *Major v. Hawkes*, 12 Ill. 298; *Western Stage Co. v. Walker*, 2 Iowa, 504; *Seldner v. Mt. Jackson Nat. Bank*, 66 Md. 488, 8 Atl. 262; *Gray v. Green*, 142 N. Y. 316, 37 N. E. 124; *Robbins v. Fuller*, 24 N. Y. 570; *Hilton v. Vanderbilt*, 82 N. Y. 591; *Thursby v. Lidgerwood*, 69 N. Y. 198; *Lange v. Kennedy*, 20 Wis. 279; *Huntington v. Potter*, 32 Barb. (N. Y.) 300; *Gates v. Beecher*, 60 N. Y. 518, *Burdick's Cases*, 372; *Sutton v. Dillaye*, 3 Barb. (N. Y.) 529; *Hubbard v. Matthews*, 54 N. Y. 43; *Briggs v. Briggs*, 15 N. Y. 471; *Whiting v. Farrand*, 1 Conn. 60; *Palmer v. Sawyer*, 114 Mass. 1; *Smythe v. Harvie*, 31 Ill. 62; *Butchart v. Dresser*, 1b Hare, 453, 4 De Gex, M. & G. 542; *Peacock v. Peacock*, 16 Ves. 57, 1b Eng. Rul. Cas. 552. The partnership, with all its incidents, continues for the purpose of settling the partnership affairs, and until that is effected. *Murray v. Mumford*, 6 Cow. (N. Y.) 441. Payment of rent due under a pre-existing partnership lease is not the creation of a new obligation, but the payment of debt due from the firm, which the partner had the right to make. *Barnes v. Northern Trust Co.*, 169 Ill. 112, 48 N. E. 31.

⁵⁴ *Gray v. Green*, 142 N. Y. 316, 37 N. E. 124; *Goertner v. Trustees of Canajoharie*, 2 Barb. (N. Y.) 625; *Lapenta v. Lettieri*, 72 Conn. 377, 44 Atl. 730.

⁵⁵ *Hogendobler v. Lyon*, 12 Kan. 276; *Needham v. Wright*, 140 Ind.

or pledge or mortgage them for the purpose of completing a transaction already commenced,⁵⁶ or of securing a debt already incurred.⁵⁷ Each partner has authority to collect debts due the firm, receive payment, and grant discharges.⁵⁸ He also has power to pay and settle firm liabilities.⁵⁹ New obligations which are necessary and merely incidental to the performance of existing obligations of the firm may be incurred,⁶⁰ but where their advisability is doubtful one party cannot proceed against the dissent of his copartner.^{60a} This authority does not extend to a bankrupt partner, for a firm is in no case bound by the acts of a bankrupt partner,⁶¹

190, 39 N. E. 510, *Burdick's Cases*, 260; *Robbins v. Fuller*, 24 N. Y. 570; *Fox v. Hanbury*, Cowp. 445.

⁵⁶ *Butchart v. Dresser*, 4 De Gex, M. & G. 542; *Miller v. Florer*, 15 Ohio St. 148. But compare *Roots v. Mason City S. & M. Co.*, 27 W. Va. 483.

⁵⁷ *Thompson v. Noble*, 108 Mich. 19, 65 N. W. 563; *In re Clough*, 31 Ch. Div. 325.

⁵⁸ *Gordon v. Albert*, 168 Mass. 150, 46 N. E. 423; *Van Keuren v. Parmelee*, 2 N. Y. 523, *Mechem's Cases*, 411; *Robbins v. Fuller*, 24 N. Y. 570; *Huntington v. Potter*, 32 Barb. (N. Y.) 300; *Ward v. Barber*, 1 E. D. Smith (N. Y.) 423; *Goertner v. Trustees of Canajoharie*, 2 Barb. (N. Y.) 625; *Fettretch v. Armstrong*, 5 Rob. (N. Y.) 339; *Sanford v. Mickles*, 4 Johns. (N. Y.) 224; *Riddle v. Etting*, 32 Pa. 412. Payment to a retiring partner, with notice that he has retired, is good. *Fettretch v. Armstrong*, 5 Rob. (N. Y.) 339. See, also, to same effect, *Gillilan v. Sun Mut. Ins. Co.*, 41 N. Y. 376. A partner has no power to accept anything but money in payment of a firm debt. *Kutz v. Naugle*, 7 Pa. Super. Ct. 179.

⁵⁹ *Milliken v. Loring*, 37 Me. 408; *Bass v. Taylor*, 34 Miss. 342.

⁶⁰ *Butchart v. Dresser*, 10 Hare, 453, 4 De Gex, M. & G. 542, *Burdick's Cases*, 363. Although, ordinarily, a partner has no authority after dissolution to make or renew negotiable paper, where the firm had agreed to renew certain notes, and subsequently dissolved, any partner has authority to renew the notes, in pursuance of the firm agreement. *Richardson v. Moles*, 31 Mo. 430, *Burdick's Cases*, 366.

^{60a} Extensive and doubtful litigation. *Richard v. Mouton*, 109 La. 465, 33 So. 563.

⁶¹ *Craven v. Edmondson*, 6 Bing. 734, 31 Rev. R. 529; and *Dickson v. Cass*, 1 Barn. & Adol. 343.

though any person who has, after the bankruptcy, represented himself, or suffered himself to be represented, as a partner of the bankrupt, may be liable for his acts.⁶²

A partner has no authority, after dissolution, to make or indorse negotiable paper on behalf of the firm,⁶³ unless he has been specially authorized to do so by his copartners. But where negotiable paper forms part of the firm assets, it seems that a partner, in the course of winding up the partnership affairs, may transfer such paper by an indorsement, "Without recourse."⁶⁴ After dissolution, a partner cannot bind his copartners by an admission of liability.⁶⁵ So it is generally held that one partner cannot take a case out of the statute of limitations by an admission of liability, new promise, or par-

⁶² *Lacy v. Woolcott*, 2 Dowl. & R. 458.

⁶³ *Huntington-White Lime Co. v. Mock*, 14 Ind. App. 221; *Smith v. Sheldon*, 35 Mich. 42, *Mechem's Cases*, 431; *Goodspeed v. South Bend Chilled Plow Co.*, 45 Mich. 237, 7 N. W. 810; *Potter v. Tolbert*, 113 Mich. 486, 71 N. W. 849, *Burdick's Cases*, 367; *Sanford v. Mickles*, 4 Johns. (N. Y.) 224; *Lansing v. Gaine*, 2 Johns. (N. Y.) 300; *National Bank v. Norton*, 1 Hill (N. Y.) 572; *Mitchell v. Ostrom*, 2 Hill (N. Y.) 520; *Lusk v. Smith*, 8 Barb. (N. Y.) 570; *McCowin v. Cubbison*, 72 Pa. 358; *Tarver v. Evansville Furniture Co.*, 20 Tex. Civ. App. 66, 48 S. W. 199; *Commercial Bank v. Miller*, 96 Va. 357, 31 S. E. 812. To the effect that a partner, after dissolution, can give notes in liquidation of a partnership liability, as, by so doing he does not create a new debt or obligation, see *McPherson v. Rathbone*, 11 Wend. (N. Y.) 96, and *Ward v. Tyler*, 52 Pa. 393.

⁶⁴ *Yale v. Eames*, 1 Metc. (Mass.) 486. Contra, *Fellows v. Wymab*, 33 N. H. 351; *Sanford v. Mickles*, 4 Johns. (N. Y.) 224.

⁶⁵ *Hackley v. Patrick*, 3 Johns. (N. Y.) 356; *Smith v. Ludlow*, 6 Johns. (N. Y.) 267; *Hopkins v. Banks*, 7 Cow. (N. Y.) 650; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409; *Brisban v. Boyd*, 4 Paige, Ch (N. Y.) 17; *Hart v. Woodruff*, 24 Hun (N. Y.) 510, *Burdick's Cases*, 370; *Barnes v. Northern Trust Co.*, 169 Ill. 112, 48 N. E. 31. Contra, *Wood v. Braddick*, 1 Taunt. 104. After dissolution, one partner has no power to bind his copartners by a promise to pay a firm indorsement from which they have been discharged by want of notice of dishonor. *Schoneman v. Fegley*, 7 Pa. 433.

tial payment.⁶⁶ but upon this point there is a difference of opinion, and some courts have taken a contrary view.⁶⁷

Of course, if there has been no notice of dissolution, the implied powers of a partner remain the same after as before dissolution.⁶⁸

SAME—OF LIQUIDATING PARTNERS.

149. By mutual agreement, the partners may delegate exclusive authority to one or more of their number to wind up and settle the partnership affairs.

A liquidating partner is one of a dissolved firm who receives and disburses the assets, to the exclusion of the others, with their consent, and by his own apparent voluntary action. Formal appointment is not necessary, nor must every act of his be without consultation with the others.⁶⁹ The duty of a liquidating partner is to collect and adjust debts due to the firm, to turn the assets into money, to pay and discharge the outstanding liabilities, and then to pay over to the other partners their just share of the remaining surplus.⁷⁰ He has the same powers and authority that any other partner has after

⁶⁶ *Tate v. Clements*, 16 Fla. 339; *Van Keuren v. Parmelee*, 2 N. Y. 523, *Mechem's Cases*, 411; *Bush v. Stowell*, 71 Pa. 208; *Reppert v. Colvin*, 48 Pa. 248; *Levy v. Cadet*, 17 Serg. & R. (Pa.) 126; *Jack v. McLanahan*, 191 Pa. 631, 43 Atl. 356; *Davis v. Poland*, 92 Va. 225, 23 S. E. 292; *Bell v. Morrison*, 1 Pet. (U. S.) 351. Compare *Forbes v. Garfield*, 32 Hun (N. Y.) 389; *Clement v. Clement*, 69 Wis. 599, 35 N. W. 17.

⁶⁷ *Beardsley v. Hall*, 36 Conn. 270; *Merritt v. Day*, 38 N. J. Law, 32; *Whitcomb v. Whiting*, 2 Doug. 652.

⁶⁸ See *Bristol v. Sprague*, 8 Wend. (N. Y.) 423. And see, generally, *ante*, § 107.

⁶⁹ *Garretson v. Brown*, 185 Pa. 447, 40 Atl. 293; *Fulton v. Central Bank of Pittsburgh*, 92 Pa. 112.

⁷⁰ *Gilmore v. Ham*, 142 N. Y. 1, 36 N. E. 826; *Woodson v. Wood*, 84 Va. 478, 5 S. E. 277.

dissolution, and no greater, unless they are expressly conferred. His authority is limited to the performance of acts necessary or proper to the winding up of the partnership business,⁷¹ and cannot, except as to persons having no notice of the dissolution, bind the firm by new obligations.^{71a} The appointment merely takes away the authority of the other partners to act, and confers it exclusively upon the liquidating partner.⁷² Thus, a liquidating partner has no implied authority to make, indorse, or renew negotiable paper on behalf of the firm.⁷³ So, he has no authority to bind his late copartners by an acknowledgment or admission of liability.⁷⁴ In Pennsylvania, the powers of a liquidating partner are somewhat more extensive than those of partners generally after dissolution.⁷⁵

⁷¹ *Hilton v. Vanderbilt*, 82 N. Y. 591; *Gilmore v. Ham*, 142 N. Y. 1; *Palmer v. Dodge*, 4 Ohio St. 21.

^{71a} *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176, 42 S. E. 415.

⁷² *Hayes v. Heyer*, 4 Sandf. Ch. (N. Y.) 485. In *Napier v. McLeod*, 9 Wend. (N. Y.) 120, two partners, on the dissolution, constituted the third their attorney to collect, etc., all debts due to the firm. It was held that the power, although in terms irrevocable, did not operate as a transfer, and that a release of a debt, subsequently executed by one of the other partners, was good.

⁷³ *Bank of Montreal v. Paige*, 98 Ill. 109; *Van Valkenburg v. Bradley*, 14 Iowa, 108; *Perrin v. Keene*, 19 Me. 355; *Potter v. Tolbert*, 113 Mich. 486, 71 N. W. 849, *Burdick's Cases*, 367; *Smith v. Sheldon*, 35 Mich. 42, *Mechem's Cases*, 431; *Mauney v. Colt*, 80 N. C. 300; *Palmer v. Dodge*, 4 Ohio St. 21; *Haddock v. Crocheron*, 32 Tex. 276; *Parker v. Cousins*, 2 Grat. (Va.) 372. See, also, *Brown v. Bamberger*, 110 Ala. 342, 20 So. 114. As to the right to give a mere acknowledgment of the amount due in the form of a due-bill or 'I. O. U.,' see *Smith v. Sheldon*, 35 Mich. 42, *Mechem's Cases*, 431.

⁷⁴ *Hackley v. Patrick*, 3 Johns. (N. Y.) 536. This rule is, of course, subject to the difference of opinion prevailing upon the general question whether any partner has such authority after dissolution. See preceding section.

⁷⁵ In Pennsylvania, a liquidating partner has power to borrow money, on the credit of the late firm, for the purpose of paying the

As to persons having notice of the appointment of a liquidating partner, the other partners have no power to bind the firm, but as to the persons without notice, any partner has power to bind the firm by any act within the apparent scope of his authority, notwithstanding the appointment of a liquidating partner.⁷⁶ The extent of the apparent or implied authority of a partner, both before and after dissolution, has already been considered.

A liquidating partner is a *quasi* trustee, and must act with perfect good faith in all things, and is liable for any negligence or fraud, but not for mere errors of judgment.⁷⁷ He is bound to account, and acts of fraud by his copartners do not relieve him of such duty though they may entitle him to allowances in his account.^{77a}

In the absence of special agreement, a liquidating partner is not entitled to compensation for winding up the business, by way of commission or otherwise.⁷⁸

debts. *Davis' Estate*, 5 Whart. (Pa.) 530; *Whitehead v. Bank of Pittsburgh*, 2 Watts & S. (Pa.) 172; *Robinson v. Taylor*, 4 Pa. 242; *Brown v. Clark*, 14 Pa. 469; *McCowin v. Cubbison*, 72 Pa. 358. He may bind his late copartners by an indorsement made for the purpose of raising money to pay partnership debts. *Lloyd v. Thomas*, 79 Pa. 68. He may make or renew partnership notes. *Meyran v. Abel*, 189 Pa. 215, 42 Atl. 122. He may renew an accommodation indorsement. *Dundas v. Gallagher*, 4 Pa. 205. The acknowledgment of a liquidating partner stops the running of the statute of limitations which has not already closed on the claim. *McCoon v. Galbraith*, 29 Pa. 293. See, also, *Jack v. McLanahan*, 191 Pa. 631, 43 Atl. 356.

⁷⁶ *Gillilan v. Sun Mut. Ins. Co.*, 41 N. Y. 376; *Clark v. Reed*, 31 Leg. Int. (Pa.) 413.

⁷⁷ See *Garretson v. Brown*, 185 Pa. 447, 40 Atl. 293; *Renfrow v. Pearce*, 68 Ill. 125; *Gunn v. Black*, 60 Fed. 151, 8 C. C. A. 534.

^{77a} *Wilson v. Keller*, 195 Pa. 98, 45 Atl. 682.

⁷⁸ *Dougherty v. Van Nostrand*, Hoff. Ch. (N. Y.) 68; *Stockdale v. Maginn*, 207 Pa. 227, 56 Atl. 439; *Lamb v. Wilson*, 3 Neb. (Unoff.) 496, 92 N. W. 167.

SAME—OF SURVIVING PARTNERS.

150. Upon the death of a partner, the surviving partner or partners have the exclusive right of possession and control of the joint property for the purpose of winding up the partnership business, and may do any act necessary or proper for that purpose.

In General.

It has already been seen that the legal title to firm personality, and the equitable title to firm realty, pass upon the death of a partner to the survivors, but in trust for the purpose of winding up the partnership affairs.⁷⁹ The survivors have the exclusive right and duty to act in the settlement of the partnership, and the personal representatives of the deceased partner cannot interfere.⁸⁰ And upon the death of the last

⁷⁹ See ante, c. 7, "Partnership Property." See, also, *Miller v. Jones*, 39 Ill. 54; *Merritt v. Dickey*, 38 Mich. 41; *Way v. Stebbins*, 47 Mich. 296, 11 N. W. 166; *Barry v. Briggs*, 22 Mich. 201; *Bassett v. Miller*, 39 Mich. 133; *Blodgett v. City of Muskegon*, 60 Mich. 580, 27 N. W. 686; *Pfeffer v. Steiner*, 27 Mich. 537. A surviving partner, being entitled to the possession and control of the partnership effects, can proceed directly in the district court to obtain control and to have a partition of the real estate belonging to the partnership, but standing in the name of his deceased partner. *Gray v. Palmer*, 9 Cal. 616.

⁸⁰ *Rice v. Merchants' & Planters' Nat. Bank*, 100 Ala. 617, 13 So. 659; *Merritt v. Dickey*, 38 Mich. 41; *Loomis v. Armstrong*, 49 Mich. 521; *Roberts v. Kelsey*, 38 Mich. 602; *Evans v. Evans*, 9 Paige (N. Y.) 178; *Jacquin v. Buisson*, 11 How. Prac. (N. Y.) 385; *Clay v. Field*, 34 Fed. 375; *McGorray v. O'Connor*, 87 Fed. 586. Chancery will not appoint a receiver, and thus deprive the survivor of the right to close up the affairs of the firm, if he is responsible, and acts in good faith. *Evans v. Evans*, 9 Paige, Ch. (N. Y.) 178; *Connor v. Allen*, Har. (Mich.) 371. Payment of one-half of a debt due the firm to the executor of a deceased partner will not discharge the debtor

survivor, the right passes to his personal representative. It is immaterial whether the partnership was dissolved by death, or whether the death took place after a previous voluntary dissolution. The rights of the survivor are the same in either case.⁸¹ In a few states, provision is made by statute for the administration of the partnership estate. The surviving partner is given the prior right to take out letters of administration, but if he fails to do so, the administration devolves upon the personal representative of the deceased partner.⁸²

The powers and authority of surviving partners, as in the case of liquidating partners, or partners generally after dissolution, extend to, and are limited by, such acts as are necessary or proper to wind up the affairs of the late firm.⁸³ They may do whatever is needful to that end, even to the borrowing of money.^{83a} They may and must carry out existing obligations, and have power to do anything incidental thereto,⁸⁴ but they have no implied power to enter into new contracts from liability to the survivor. *Wallace v. Fitzsimmons*, 1 Dall. (Pa.) 248.

⁸¹ *Murray v. Mumford*, 6 Cow. (N. Y.) 441, in which case the liquidating partner died, and it was held that the other partner was entitled to the possession of firm assets, as against the personal representatives of the deceased.

⁸² See, generally, *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164; *Carr v. Catlin*, 13 Kan. 393; *Matherson v. Wilkinson*, 79 Me. 159, 8 Atl. 684; *McCaughan v. Brown*, 76 Miss. 496, 25 So. 155; *Hargardine v. Gibbons*, 114 Mo. 561, 21 S. W. 726, affirming 45 Mo. App. 460; *State v. Withrow*, 141 Mo. 69, 41 S. W. 980; *Goodson v. Goodson*, 140 Mo. 206, 41 S. W. 737.

⁸³ Powers of surviving partners, see, generally, *Barton v. Lovejoy*, 56 Minn. 380, 57 N. W. 935; *Bloodgood v. Bruen*, 8 N. Y. 362; *Corder v. Steiner* (Tex. Civ. App.), 54 S. W. 277.

^{83a} *Rosenthal v. Hasberg*, 84 N. Y. Supp. 290.

⁸⁴ *Little v. Caldwell*, 101 Cal. 553, 36 Pac. 107; *Oliver v. Forrester*, 96 Ill. 315; *Mason v. Tiffany*, 45 Ill. 392; *Miller v. Hoffman*, 26 Mo. App. 199; *Denver v. Roane*, 99 U. S. 355.

tracts, or to continue the partnership business.⁸⁵ By express agreement, or by provision in the will of the deceased partner, the survivors may be authorized to carry on the business and incur new obligations, notwithstanding the death of a partner.⁸⁶ In such case, the surviving partners cannot bind the general assets of the estate of the deceased partner, but only those already invested in the business.⁸⁷

Particular Powers.

The surviving partner may apply partnership funds to the liquidation of any obligation of the firm, and to the discharge of all liens upon the joint property.⁸⁸ He may sell partner-

⁸⁵ *Remick v. Emig*, 42 Ill. 342; *Forrester v. Oliver*, 1 Ill. App. 259; *Young v. Scoville*, 99 Iowa, 177, 68 N. W. 670; *Robinson v. Simmons*, 146 Mass. 167, 15 N. E. 558; *Oliver v. Olmstead*, 112 Mich. 483, 70 N. W. 1036; *Dexter v. Dexter*, 43 App. Div. 263, 60 N. Y. Supp. 371; *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176, 42 S. E. 415. The surviving partner may continue the business long enough to close it out without sacrificing it, but no longer. *Frey v. Eisenhardt*, 116 Mich. 160, 74 N. W. 501. Since death of a member dissolves a partnership, a continuation of the business thereafter by the surviving partner and the executor of the deceased member, in pursuance of an agreement between them, is the formation of a new partnership. *McGrath v. Cowen*, 57 Ohio St. 385, 49 N. E. 338.

"Where the assets of a partnership, dissolved by the death of one of its members, were used by a new firm formed by the surviving partner, the old partnership was entitled to a share in the profits of the new firm proportionate to the value of the property or services contributed by the new firm, but all the property of the new firm should not be regarded as assets of the old." *Painter's Ex'rs v. Painter*, 133 Cal. XIX, 65 Pac. 135.

⁸⁶ *Evans v. Watts*, 44 W. N. C. (Pa.) 185; *Stewart v. Robinson*, 115 N. Y. 328, 22 N. E. 160, 163.

⁸⁷ *Steiner v. Steiner Land & Lumber Co.*, 120 Ala. 128, 26 So. 494; *In re Roessler's Estate*, 19 Pa. Co. Ct. Rep. 161, 5 Pa. Dist. Rep. 776; *Jones v. Walker*, 103 U. S. 444, *Mechem's Cases*, 391.

⁸⁸ *Shearer v. Shearer*, 98 Mass. 107, *Ames' Cas.* 185; *Lindner v. Adams County Bank*, 49 Neb. 735, 68 N. W. 1028, *Burdick's Cases* 262, *Mechem's Cases*, 401; *Molst's Adm'rs' Appeal*, 74 Pa. 166.

ship assets,⁸⁹ or pledge or mortgage them,⁹⁰ for purposes connected with the settlement of the estate,⁹¹ or may make an assignment for the benefit of creditors.⁹² He has the sole right to collect and settle claims, receive payment, and grant discharges.⁹³ A surviving partner cannot make or indorse negotiable paper, so as to bind other cosurvivors or the estate of

⁸⁹ *Milner v. Cooper*, 65 Iowa, 190, 21 N. W. 558; *Cockerham v. Bosley*, 52 La. Ann. 65, 26 So. 814; *Durant v. Pierson*, 124 N. Y. 444, 26 N. E. 1095, *Mechem's Cases*, 403. A sole surviving partner has a right, acting honestly and with reasonable discretion and diligence, to dispose of the partnership assets as he pleases, to settle all debts against the firm, to make any compromise he may deem necessary, and to turn the assets into an available and distributable form. *Barry v. Briggs*, 22 Mich. 201. See, also, to same effect, *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; *Loeschigk v. Hatfield*, 51 N. Y. 660; *Milner v. Cooper*, 65 Iowa, 190, 21 N. W. 558. A surviving partner has power to assign a chose in action, e. g., a bond and mortgage, belonging to the late firm, and payable to them. *Pinckney v. Wallace*, 1 Abb. Prac. (N. Y.) 82.

⁹⁰ *Breen v. Richardson*, 6 Colo. 605; *Burchinell v. Koon*, 25 Colo. 59, affirming 8 Colo. App. 463; *In re Crane's Estate*, 4 Ohio Dec. 398; *Durant v. Pierson*, 124 N. Y. 444, 26 N. E. 1095, *Mechem's Cases*, 403; *Williams v. Whedon*, 109 N. Y. 333, 16 N. E. 365; *Bohler v. Tappan*, 1 Fed. 469; *Butchart v. Dresser*, 4 De Gex, M. & G. 542.

⁹¹ As against the heirs of a deceased partner, a surviving partner cannot mortgage the decedent's interest in partnership lands for his own individual debts, or for any purpose except to close up the business, and pay partnership debts. *Brown v. Watson*, 66 Mich. 223, 33 N. W. 493.

⁹² *Shattuck v. Chandler*, 40 Kan. 516, 20 Pac. 225, *Mechem's Cases*, 296; *Loeschigk v. Hatfield*, 5 Rob. (N. Y.) 26, 4 Abb. Prac. (N. S.; N. Y.) 210, affirmed 51 N. Y. 660; *Egberts v. Wood*, 3 Paige (N. Y.) 517; *Hutchinson v. Smith*, 7 Paige, Ch. (N. Y.) 26; *Williams v. Whedon*, 109 N. Y. 333, 16 N. E. 365; *Patton v. Leftwich*, 86 Va. 421; *Emerson v. Senter*, 118 U. S. 3, *Burdick's Cases*, 253. But see *State v. Withrow*, 141 Mo. 69, 41 S. W. 980.

⁹³ *Cockerham v. Bosley*, 52 La. Ann. 65, 26 So. 814; *McCaughan v. Brown*, 76 Miss. 496, 25 So. 155. A settlement between an employee of a partnership and the surviving partner, fixing the past salary of the employee, which had never before been agreed upon, is binding upon the firm and the heirs or representatives of the deceased part-

the deceased partner, in the absence of express authority.⁹⁴ A debt cannot be revived by the surviving partner, so as to charge the estate or interest of the deceased partner, when barred by statute, against the partnership.⁹⁵

Actions.

At common law after the death of a partner, all actions upon claims in favor of or against the firm must be brought by or against the surviving partners alone. The personal representative of the deceased partner cannot be joined either as a plaintiff⁹⁶ or as a defendant.⁹⁷ Upon the death of the last survivor, his personal representatives alone can sue or be sued.⁹⁸ These rules resulted from the joint nature of partnership liabilities and demands. At common law, the death of a partner or joint debtor absolutely discharged his liability, and cast it upon the survivor. So, upon the death of a joint obligee, the entire beneficial interest passed to the survivors.⁹⁹ The rule was otherwise in equity, and has been very generally

ner, unless set aside in a direct proceeding, on the ground of error, mistake, or fraud. *Hart v. Bowen*, 86 Fed. 877.

⁹⁴ *Carleton v. Jenness*, 42 Mich. 110, 3 N. W. 284; *Matteson v. Nathansohn*, 38 Mich. 377. Compare *Johnson v. Berlitzheimer*, 84 Ill. 54.

⁹⁵ *Bloodgood v. Bruen*, 8 N. Y. 362.

⁹⁶ *Belton v. Fisher*, 44 Ill. 32; *Brown v. Allen*, 35 Iowa, 306; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411; *Holbrook v. Lackey*, 13 Meta. (Mass.) 132; *Bassett v. Miller*, 39 Mich. 133; *Holmes v. DeCamp*, 1 Johns. (N. Y.) 34; *Daby v. Ericsson*, 45 N. Y. 786; *Beach v. Hayward*, 10 Ohio, 455; *Davis v. Church*, 1 Watts & S. (Pa.) 241; *McCartney v. Hubbell*, 52 Wis. 360, 9 N. W. 61.

⁹⁷ *Palmer v. Maxwell*, 11 Neb. 598, 10 N. W. 524; *Arthur v. Griswold*, 16 Abb. Prac. (N. S.; N. Y.) 238; *Voorhis v. Baxter*, 18 Barb. (N. Y.) 592; *Hoskinson v. Elliot*, 62 Pa. 393; *Rusling v. Brodhead*, 55 N. J. Eq. 200, 35 Ala. 841, *Burdick's Cases*, 273. The contrary is held under the code. See *Ricart v. Townsend*, 6 How. Prac. (N. Y.) 460; *Henderson v. Kissam*, 8 Tex. 46.

⁹⁸ *Galbraith v. Tracy*, 153 Ill. 54, 38 N. E. 937, *Burdick's Cases*, 257; *Nehrboss v. Bliss*, 88 N. Y. 600, *Burdick's Cases*, 246; *Costley v. Wilkerson's Adm'r*, 49 Ala. 210; *Richards v. Heather*, 1 Barn. & Ald. 38.

⁹⁹ *Roosevelt v. McDowell*, 1 Ga. 489; *Walker v. Doane*, 131 Ill. 27

changed by statute. Thus, in some states it is provided that the personal representatives of a deceased partner may be joined as defendants with the survivors.¹⁰⁰ In other states, partnership obligations have been made joint and several, and a firm creditor may either sue the survivors alone, or proceed against the estate of the deceased partner separately.¹⁰¹

Right to Compensation.

The law imposes upon the surviving partner, as an incident to the contract of partnership, the duty of collecting the assets and winding up the business of the firm, and he is not entitled to compensation therefor, in the absence of an express agreement to that effect.¹⁰²

Liability to Estate of Decedent.

Whether or not a surviving partner is to be regarded as a trustee may admit of some question,¹⁰³ but, at all events, in

22 N. E. 1006; *Eich v. Sievers*, 73 Ill. 194; *Wapello County v. Bigham*, 10 Iowa, 39; *Cochrane v. Cushing*, 124 Mass. 219; *Fisher v. Allen*, 36 N. J. Law, 203; *Neal's Ex'rs v. Gilmore*, 79 Pa. 421; *Grant v. Shurter*, 1 Wend. (N. Y.) 148; *Hargadine v. Gibbons*, 45 Mo. App. 460; *Pendleton v. Phelps*, 4 Day (Conn.) 481; *Trundle v. Edwards*, 4 Sneed (Tenn.) 574. That there is no beneficial survivorship in partnership property, see ante, c. 7, "Partnership Property."

¹⁰⁰ *Anderson v. Pollard*, 62 Ga. 46; *Trundle v. Edwards*, 4 Sneed (Tenn.) 573; *Wiesenfeld v. Byrd*, 17 S. C. 113.

¹⁰¹ *Ralston v. Moore*, 105 Ind. 246, 4 N. E. 673; *Shackleford's Adm'r v. Clark*, 78 Mo. 491; *Weil v. Guerin*, 42 Ohio St. 302.

¹⁰² *Young v. Scoville*, 99 Iowa, 177, 68 N. W. 670; *Com. v. Bracken's Heirs*, 17 Ky. L. R. 785, 32 S. W. 609; *Coakley's Adm'r v. Hazelwood's Ex'r*, 21 Ky. L. R. 40, 49 S. W. 1067; *Smith v. Smith*, 51 La. Ann. 72, 24 So. 618; *Loomis v. Armstrong*, 49 Mich. 521, 14 N. W. 505, 63 Mich. 355, 29 N. W. 867; *Ames v. Downing*, 1 Bradf. (N. Y.) 321, *Burdick's Cases*, 606. Compare *Robinson v. Simmons*, 146 Mass. 167, 15 N. E. 558; *Zell's Appeal*, 126 Pa. 329, 17 Atl. 647; *Painter v. Painter* (Cal.), 36 Pac. 865. In the absence of an express provision to the contrary, salary provided for by the partnership articles does not continue after dissolution of partnership by death of a partner. Rights of surviving partners were being considered *Comstock v. McDonald*, 126 Mich. 142, 85 N. W. 572.

¹⁰³ See ante, §§ 67-71.

all his transactions he is liable for the most perfect good faith, and must afford the representatives of the deceased full information as to the affairs of the firm, and must account to them for his administration of the estate.¹⁰⁴ He cannot make any profit by use of the partnership effects for his own benefit.¹⁰⁵ A surviving partner is liable to the estate of the deceased partner for any losses caused by his negligence or want of good faith, but not otherwise.¹⁰⁶

SAME—OF ESTATE OF DECEASED PARTNER.

151. The estate of a deceased partner is entitled to receive from the survivors such partner's share of the firm assets after all its affairs have been settled.
152. The estate of a deceased partner is liable in equity, and under modern statutes, to firm creditors.

It has been seen in a previous chapter that, upon the death of a partner, the title to firm assets vests in the survivors, but merely for the purpose of settling up the partnership affairs. There is no beneficial right of survivorship, and the

¹⁰⁴ *Robertson v. Burrell*, 110 Cal. 568, 42 Pac. 1086; *Valentine v. Wysor*, 123 Ind. 47, 23 N. E. 1076; *Mechem's Cases*, 382; *Cockerham v. Bosley*, 52 La. Ann. 65, 26 So. 814; *Coakley's Adm'r v. Hazelwood's Ex'r*, 21 Ky. L. R. 40, 49 S. W. 1067; *Heath v. Waters*, 40 Mich. 457; *Roberts v. Kelsey*, 38 Mich. 602; *Ogden v. Astor*, 4 Sandf. (N. Y.) 311.

¹⁰⁵ *Little v. Caldwell*, 101 Cal. 553, 36 Pac. 107; *Galbraith v. Tracy*, 153 Ill. 54, 38 N. E. 937, *Burdick's Cases*, 257; *Denholm v. McKay*, 148 Mass. 434, 19 N. E. 551; *Bell v. McCoy*, 136 Mo. 552, 38 S. W. 329; *Case v. Abeel*, 1 Paige, Ch. (N. Y.) 393; *Ogden v. Astor*, 4 Sandf. (N. Y.) 311.

¹⁰⁶ *Oliver v. Forrester*, 96 Ill. 315; *Gresham v. Harcourt*, 93 Tex. 149, 53 S. W. 1019; *Cockerham v. Bosley*, 52 La. Ann. 65, 26 So. 814; *Scudder v. Ames*, 142 Mo. 187, 43 S. W. 659.

survivors must account to the representatives of the deceased partner for his shares.¹⁰⁷

At common law, partnership obligations were joint, and consequently, upon the death of a partner, his liability was absolutely discharged, and the creditors could sue the survivors only.¹⁰⁸ In equity, firm creditors have always had a remedy against the deceased partner's estate, but whether that remedy is concurrent with the remedy at law against the survivors, or whether it can only be resorted to after exhausting, without avail, the remedy against the survivors, is a question upon which two opposing doctrines prevail. It has frequently been said that, in equity, partnership debts are joint and several.¹⁰⁹ And upon this theory the doctrine has become established, in England and many states in this country, that creditors of the firm have concurrent remedies against the estate of the deceased partner and the surviving partners, and that it is immaterial which remedy is pursued first.¹¹⁰ It is now pretty well recognized that partnership obligations are joint in equity as well as at law,¹¹¹ but the doctrine, having once been established in these jurisdictions, still prevails. In most jurisdictions in this country, however, it is held that the firm creditors must exhaust their remedy at law against the survivors, or show that they are insolvent, before they can resort to the estate of the deceased partner.¹¹²

¹⁰⁷ See ante, c. 7.

¹⁰⁸ See ante, p. 284.

¹⁰⁹ Bates, Partn. § 748; *Wilkerson v. Henderson*, 1 Mylne & K. 532.

¹¹⁰ *Savings & Loan Soc. v. Gibb*, 21 Cal. 596; *Mason v. Tiffany*, 45 Ill. 392; *Doggett v. Dill*, 108 Ill. 560, *Burdick's Cases*, 495, *Mechem's Cases*, 395; *Nelson v. Hill*, 5 How. (U. S.) 127; *Summer v. Powell*, 2 Merivale, 30, Turn. & R. 432, 16 Rev. R. 136; *Clarke v. Bickers*, 14 Sim. 639; *In re Hodgson*, 31 Ch. Div. 177; *Hills v. M'Rae*, 9 Hare, 297; *Gray v. Chiswell*, 9 Ves. 118b; *Wilkinson v. Henderson*, 1 Mylne & K. 582; English Partnership Act 1890, § 9.

¹¹¹ *Kendall v. Hamilton*, 4 App. Cas. 504, *Burdick's Cases*, 488; *In re Hodgson*, 31 Ch. Div. 177.

¹¹² *Alsop v. Mather*, 8 Conn. 584; *Currey v. Warrington*, 5 Har

The direct remedy in equity against the estate of a deceased partner really rests upon a sort of equitable transfer to the creditor of the surviving partner's right to compel the estate of a deceased partner to contribute.¹¹³

Statutes exist in many states making partnership obligations joint and several. The effect of such statutes is to give a remedy at law in the first instance against the estate of a deceased partner.¹¹⁴

The right of joint creditors to compete with separate creditors in the distribution of the estate has already been considered.¹¹⁵

SAME—OF CREDITORS.

153. A mere dissolution does not relieve partners from existing liabilities to creditors.

It is obvious that the partners cannot relieve themselves from their liability to creditors by a mere dissolution, or by any arrangement between themselves as to the performance of their obligations,¹¹⁶ though the creditor may, at his option,

(Del.) 147; *Gowan v. Tunno*, Rich. Eq. Cas. (S. C.) 369; *Anderson v. Pollard*, 62 Ga. 46; *Pullen v. Whitfield*, 55 Ga. 174; *Pearson v. Keddy*, 6 B. Mon. (Ky.) 128; *Voorhis v. Childs' Ex'r*, 17 N. Y. 354, *Burdick's Cases*, 490; *Pope v. Cole*, 55 N. Y. 124; *Island Sav. Bank v. Galvin*, 19 R. I. 569, 36 Atl. 1125, *Burdick's Cases*, 500 (by statute); *Sherman v. Kreul*, 42 Wis. 33.

¹¹³ *Voorhis v. Childs' Ex'r*, 17 N. Y. 354, *Burdick's Cases*, 490.

¹¹⁴ *Camp v. Grant*, 21 Conn. 41; *McLain v. Carson*, 4 Ark. 164; *Manning v. Williams*, 2 Mich. 105; *In re Gray's Estate*, 111 N. Y. 404, 18 N. E. 719.

¹¹⁵ See ante, §§ 129-132.

¹¹⁶ *Griswold v. Waddington*, 16 Johns. (N. Y.) 438; *Bronx Metal Bed Co. v. Wallerstein*, 84 N. Y. Supp. 924; *Wood v. Braddick*, 1 Taunt. 104; *Crawshay v. Maule*, 1 Swanst. 495; *Ex parte Williams*, 11 Ves. 3.

proceed against the survivor alone.^{116a} If, however, the creditor assents to an arrangement between the partners by which he is to look only to some of them for his debt, the other partners will be discharged. The rights of creditors have been sufficiently considered in other sections of this book.¹¹⁷

^{116a} *Fennell v. Myers*, 25 Ky. L. R. 589, 76 S. W. 136. And see ante, § 122.

¹¹⁷ See the preceding sections of this chapter. See, also, c. 9, "Rights and Liabilities as to Third Persons."

CHAPTER XII.

JOINT-STOCK COMPANIES.

154-155. Definition and Nature.

DEFINITION AND NATURE.

154. Joint-stock companies are partnerships with a capital stock divided into transferable shares.
155. In the absence of statute, the ordinary principles of partnership apply to joint-stock companies.

The division of the capital stock into a definite number of shares, of which each member owns one or more, and which may be transferred to others, or in other words, the absence of any *delectus personarum*, is the one essential feature of a joint-stock company.¹ A transfer of shares does not involve a dissolution of the company.² In all other respects, joint-stock companies are substantially ordinary partnerships.³ Joint-stock companies are legal at common law.⁴ In the absence of statute, they are governed by the articles of associa-

¹ Phillips v. Blatchford, 137 Mass. 510; Hedge's Appeal, 63 Pa. 273.

² Jones v. Clark, 42 Cal. 180; Tyrrell v. Washburn, 6 Allen (Mass.) 466; Carter v. McClure, 98 Tenn. 109, 38 S. W. 585, Burdick's Cases, 37.

³ Hoadley v. County Com'rs of Essex, 105 Mass. 519; Attorney-General v. Mercantile Marine Ins. Co., 121 Mass. 524; Butterfield v. Beardsley, 28 Mich. 412; Wells v. Gates, 18 Barb. (N. Y.) 554; Elliot v. Himrod, 108 Pa. 569; Wehrman v. McFarlan, 6 Ohio, N. P. 333.

⁴ Phillips v. Blatchford, 137 Mass. 510; Gleason v. McKay, 134 Mass. 419; Harrison v. Heathorn, 6 Man. & G. 81.

tions and the by-laws,⁵ and the general principles of partnership already discussed.⁶ Thus, the members are liable *in solido* for all the debts of the company.⁷ Suits by or against the company must be brought by or against the individual members in their individual names.⁸ No action at law lies between the members based upon a company claim or liability.⁹ Dissolution may be affected by mutual consent or by a decree of a court of equity in the same manner that ordinary partnerships are dissolved.¹⁰ The affairs of the company are

⁵ *Cochran v. Perry*, 8 Watts & S. (Pa.) 262; *Kingman v. Spurr*, 7 Pick. (Mass.) 235; *Stimson v. Lewis*, 36 Vt. 91.

⁶ *Pettis v. Atkins*, 60 Ill. 454; *Robbins v. Butler*, 24 Ill. 387; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 539; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513; *Crater v. Blininger*, 45 N. Y. 545; *Hedges' Appeal*, 63 Pa. 274; *Lafond v. Deems*, 52 How. Prac. (N. Y.) 41.

⁷ *Manning v. Gasharie*, 27 Ind. 399; *Sullivan v. Campbell*, 2 Hall (N. Y.) 271; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513; *Lewis v. Tilton*, 64 Iowa, 220, 19 N. W. 911; *Frost v. Walker*, 60 Me. 468; *Hedge's Appeal*, 63 Pa. 273; *Butterfield v. Beardsley*, 28 Mich. 412; *Wells v. Gates*, 18 Barb. (N. Y.) 554; *Tyrrell v. Washburn*, 6 Allen (Mass.) 466; *Walburn v. Ingilby*, 1 Mylne & K. 61; *Hess v. Werts*, 4 Serg. & R. (Pa.) 356; *Hunnewell v. Willow Springs Canning Co.*, 53 Mo. App. 245. New members are not liable for debts incurred before they became members. *Lake v. Munford*, 4 Smedes & M. (Miss.) 312. A retiring member is not liable, as between himself and the other members, for either existing or future debts. *Stimson v. Lewis*, 36 Vt. 91.

⁸ *Pipe v. Bateman*, 1 Iowa, 369; *Kingsland v. Braisted*, 2 Lans. (N. Y.) 17; *McGreary v. Chandler*, 58 Me. 537; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 542; *Niven v. Spickerman*, 12 Johns. (N. Y.) 401. See, also, *Secor v. Lord*, 3 Keyes (N. Y.) 525; *Habicht v. Pemberton*, 4 Sandf. (N. Y.) 657. Where such companies are organized under statutes, it is usually provided that the company shall sue and be sued in its own name, or in the name of some of its officers. See 11 Am. & Eng. Enc. Law, p. 1052, tit. "Joint Stock Companies."

⁹ *Bailey v. Bancker*, 3 Hill (N. Y.) 188; *Bullard v. Kinney*, 10 Cal. 60. But see *Cross v. Jackson*, 5 Hill (N. Y.) 478.

¹⁰ *Mann v. Butler*, 2 Barb. Ch. (N. Y.) 362; *Von Schmidt v. Hunt-*

managed by officers and directors elected by the members. Their power to bind the company, when acting within the scope of their authority, is the same as that of a partner to bind his firm in ordinary partnership.¹¹

Statutory Provisions.

In some jurisdictions, joint-stock companies are regulated by statute. Companies organized under such statutes are very nearly in the nature of corporations.¹² Of course the statute will prevail wherever in conflict with the general principles of partnership.

ington, 1 Cal. 55; *Burke v. Roper*, 79 Ala. 138; *Allen v. Clark*, 65 Barb. (N. Y.) 563.

¹¹ *Van Aernam v. Bleistein*, 102 N. Y. 355, 7 N. E. 537; *Bodwell v. Eastman*, 106 Mass. 525; *French Spiral Spring Co. v. New England Car Trust*, 32 Fed. 44.

¹² *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. (N. Y.) 157; *Oak Ridge Coal Co. v. Rogers*, 108 Pa. 147; *School District v. Insurance Co.*, 103 U. S. 707; *Sanford v. Board of Sup'rs of New York*, 15 How. Prac. (N. Y.) 172; *Thomas v. Dakin*, 22 Wend. (N. Y.) 9; *Maltz v. American Exp. Co.*, 1 Flap. 611, Fed. Cas. No. 9,002; *United States Exp. Co. v. Bedbury*, 34 Ill. 459.

CHAPTER XIII.

LIMITED PARTNERSHIP.

156-157. Definition and Nature.

DEFINITION AND NATURE.

156. A limited partnership is a partnership wherein the liability of one or more of the members is, by compliance with certain statutory provisions, limited to the amount of their contribution to the capital stock.
157. Except as provided by statute, the ordinary principles applicable to general partnerships are fully applicable to limited partnerships.

In General.

It has been seen, in an ordinary common-law partnership, that all the partners are liable *in solido* to the full extent of their private fortunes for all the firm obligations. In order to encourage the employment of capital in trade,¹ statutes have been enacted in most of the states, upon compliance with which partnerships may be formed in which the liability of one or more of the members is limited to the amount of their contributions to the capital of the firm. Partnerships formed under these statutes are usually called "limited partnerships," as distinguished from the ordinary or general

¹ *Singer v. Kelly*, 44 Pa. 149, *Burdick's Cases*, 674; *Van Riper v. Poppenhausen*, 43 N. Y. 73; *Clapp v. Lacey*, 35 Conn. 463, *Burdick's Cases*, 611; *Manhattan Co. v. Laimbeer*, 108 N. Y. 582, 15 N. E. 712; *Partn. § 421*.

partnership, wherein the liability of all the members is unlimited. The term "special partnership" is used in some states to designate this kind of partnership, but the term "limited partnership" seems preferable, as "particular partnerships," or partnerships for a single transaction, are sometimes called "special partnerships."

The members of a limited partnership whose liability is limited are called "special partners." The other members of the firm are called "general partners."²

Statutory Provisions.

The statutory requirements, by compliance with which the liability of an ordinary partner may be avoided, are designed for the protection of persons dealing with the firm. This end is sought by requiring publicity as to certain facts, so that persons dealing with the firm may not be misled into extending credit to persons whom they mistakenly believe to be liable as general partners,³ and by requirements designed to make sure that the contribution of the special partner has been actually paid in and not withdrawn.

The statutes of the various states differ more or less in detail, but they are substantially similar in character. The statutes all provide in what businesses a limited partnership engage. These are usually mercantile, mechanical, or manufacturing business. Insurance and banking are usually prohibited.

The number of general and special partners is usually regulated by statute.⁴

² For a general discussion of the nature and origin of limited partnerships, see *Ames v. Downing*, 1 Bradf. Sur. (N. Y.) 321, *Burdick's Cases*, 606; *Jacquin v. Buisson*, 11 How. Prac. (N. Y.) 385; *King v. Sarria*, 69 N. Y. 24; *Clapp v. Lacey*, 35 Conn. 463, *Burdick's Cases*, 611.

³ *Buck v. Alley*, 145 N. Y. 488, 40 N. E. 236, *Burdick's Cases*, 624.

⁴ *Bernard & Leas Mfg. Co. v. Packard*, 64 Fed. 309.

The statutes usually require the partners to execute a certificate stating certain facts enumerated in the statute,—usually the firm name, the nature of the business to be conducted, the names and residences of the general and special partners, the amount of each partner's contribution, and the times when the partnership shall commence and terminate.⁵ This certificate must be acknowledged, recorded, and published as required by statute.⁶

An affidavit is also usually required to the effect that the contributions stated in the certificate to have been paid in have been actually so paid in the manner stated. A false statement in the certificate or affidavit renders all the partners liable as general partners.⁷

The contribution of the special partner is usually required to be made in cash, but some statutes permit the special partner to contribute property. In either case, it is of vital importance that the contribution be in exact compliance with the statute, and be actually paid in or turned over to the general partners before the partnership begins business, for other-

⁵ *Lachaise v. Marks*, 4 E. D. Smith (N. Y.) 610; *Metropolitan Nat. Bank v. Sirret*, 97 N. Y. 320, *Burdick's Cases*, 633; *Manhattan Co. v. Phillips*, 109 N. Y. 383, 17 N. E. 129; *Gearing v. Carroll*, 151 Pa. 79, 24 Atl. 1045; *Spencer Optical Mfg. Co. v. Johnson*, 53 S. C. 533, 31 S. E. 392.

⁶ *Henkel v. Heyman*, 91 Ill. 96; *Manhattan Co. v. Laimbeer*, 108 N. Y. 578; *Manhattan Co. v. Phillips*, 109 N. Y. 383, 17 N. E. 129; *Metropolitan Nat. Bank v. Sirret*, 97 N. Y. 320, *Burdick's Cases*, 633; *Bowen v. Argall*, 24 Wend. (N. Y.) 496; *Smith v. Argall*, 6 Hill (N. Y.) 479, 3 Den. (N. Y.) 435; *Madison County Bank v. Gould*, 5 Hill (N. Y.) 309; *Tracy v. Tuffly*, 134 U. S. 206, *Burdick's Cases*, 64.

⁷ *Crouch v. First Nat. Bank*, 156 Ill. 342, 40 N. E. 974, *Burdick's Cases*, 667; *Wilson v. Bean*, 33 Ill. App. 529; *Durant v. Abendroth*, 69 N. Y. 148; *Van Ingen v. Whitman*, 62 N. Y. 513; *Ropes v. Colgate*, 17 Abb. N. C. (N. Y.) 143; *Tilge v. Brooks*, 124 Pa. 178, 16 Atl. 746; *Robbins Elec. Co. v. Weber*, 172 Pa. 635, 34 Atl. 116; *Sheble v. Strong*, 128 Pa. 315, 18 Atl. 397; *Ussery v. Crusman* (Tenn. Ch.), 47 S. W. 567; *Chick v. Robinson*, 95 Fed. 619.

wise no limited partnership will be formed, and all the members will be liable as general partners.⁸

It is usually provided that the business of the firm shall be conducted under a firm name, in which the names of the special partners shall not appear, and without the addition of the word "company," or any other general or equivalent term.⁹

In some states the statute requires the firm to post in a conspicuous place some sign on which is painted, in full, the names of all the members of the partnership, stating who are general and who are special partners.¹⁰

Withdrawal, Alteration, and Interference.

The statutes all forbid the withdrawal in any manner by the special partner of any part of his contribution. In some states it is provided that, if he does withdraw, he must restore it with interest. In other states such withdrawal renders the special partner liable as a general partner.¹¹

⁸ *Holliday v. Union & Paper Bag Co.*, 3 Colo. 342; *Lineweaver v. Slagle*, 64 Md. 465, 2 Atl. 693; *Pierce v. Bryant*, 5 Allen (Mass.) 91; *Haggerty v. Foster*, 103 Mass. 17; *Myers v. Edison Gen. Elec. Co.*, 59 N. J. Law, 153, 35 Atl. 1069; *Hotopp v. Huber*, 160 N. Y. 524, 55 N. E. 206, affirming 16 App. Div. 327, 44 N. Y. Supp. 617; *Van Ingen v. Whitman*, 62 N. Y. 513; *Metropolitan Nat. Bank v. Sirret*, 97 N. Y. 320; *Manhattan Co. v. Phillips*, 109 N. Y. 383, 17 N. E. 129; *Ropes v. Colgate*, 17 Abb. N. C. (N. Y.) 143; *Durant v. Abendroth*, 69 N. Y. 148; *Richardson v. Hogg*, 38 Pa. 153; *Rehfuss v. Moore*, 134 Pa. 462, 19 Atl. 756; *Reynolds v. Creveling*, 177 Pa. 267, 35 Atl. 686. Contribution of check is sufficient though it is not paid until after the filing of the certificate. *Chick v. Robinson*, 95 Fed. 619.

⁹ *Groves v. Wilson*, 168 Mass. 370, 47 N. E. 100; *Burdick's Cases*, 630; *Buck v. Alley*, 145 N. Y. 438, 40 N. E. 236, *Burdick's Cases*, 624; *Buck v. Alley*, 82 Hun, 29, 31 N. Y. Supp. 324; *Andrews v. Schott*, 10 Pa. 47; *Hubbard v. Morgan*, Fed. Cas. No. 6,817.

¹⁰ *Gearing v. Carroll*, 151 Pa. 79, 24 Atl. 1045.

¹¹ *Beers v. Reynolds*, 11 N. Y. 97; *Bally v. Hornthal*, 154 N. Y. 648, 49 N. E. 56; *Lachaise v. Marks*, 4 E. D. Smith (N. Y.) 610;

In most states it is provided that every alteration which shall be made in the names of the original partners, the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the limited partnership, and, if the partnership is carried on after such alteration, it shall be deemed a general partnership unless renewed as a limited partnership, as provided by statute.¹²

The statutes also provide that the general partners only shall be authorized to transact business and sign for the partnership, and provide that if the special partner transacts business for the firm, or interferes in any way, he shall be deemed a general partner.¹³

Necessity of Compliance with Statute.

A limited partnership is a true partnership, and is governed by all the principles applicable to ordinary partnerships except so far as the statute has provided otherwise.¹⁴ Accordingly, all the members are liable as general partners unless the statutory provisions have been at least substantially, and according to many cases, strictly complied with.¹⁵ "A lim-

George v. Carpenter, 73 Hun, 221, 25 N. Y. Supp. 1086; Coffin's Appeal, 106 Pa. 280; Masters v. Lauder, 131 Pa. 195, 18 Atl. 872.

¹² Sarmiento v. The Catherine C., 110 Mich. 120, 67 N. W. 1085, Burdick's Cases, 673; Perth Amboy Mfg. Co. v. Condit, 21 N. J. Law, 659, Burdick's Cases, 673; Hayes v. Heyer, 35 N. Y. 326; Buckley v. Lord, 24 How. Prac. (N. Y.) 455; Seibert v. Bakewell, 87 Pa. 506; Singer v. Kelly, 44 Pa. 145, Burdick's Cases, 674.

¹³ Columbia Land & Cattle Co. v. Daly, 46 Kan. 504, 20 Pac. 1042; Farnsworth v. Boardman, 131 Mass. 115; Jaffe v. Krum, 88 Mo. 669; Continental Nat. Bank v. Strauss, 137 N. Y. 148, 32 N. E. 1066, Burdick's Cases, 619; Sharp v. Hutchinson, 100 N. Y. 533, 3 N. E. 500; First Nat. Bank v. Whitney, 4 Lans. (N. Y.) 34; McKnight v. Ratcliff, 44 Pa. 156.

¹⁴ Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321, Burdick's Cases, 606; Wilkins v. Davis, 2 Low. 511, Fed. Cas. No. 17,664.

¹⁵ Manhattan Brass Co. v. Allin, 35 Ill. App. 336; Richardson v.

ited partnership that has not complied with the law of its creation is not a limited partnership at all. It is, however, a partnership in which all the members are liable as at common law."¹⁶ Where an attempt is made to form a limited partnership to engage in an unauthorized or prohibited business, the partnership is an ordinary one, and all the partners are liable as general partners.¹⁷

Dissolution and Renewal

Upon the expiration of the times specified in the certificate, the limited partnership comes to an end, and notice of dissolu-

Carlton, 109 Iowa, 515, 80 N. W. 532; *Lineweaver v. Slagle*, 64 Md. 465; *Pierce v. Bryant*, 5 Allen (Mass.) 91, *Burdick's Cases*, 631; *In re Allen*, 41 Minn. 430, 43 N. W. 382; *Selden v. Hall*, 21 Mo. App. 452; *White v. Eiseman*, 134 N. Y. 101, 31 N. E. 276, *Burdick's Cases*, 640; *Manhattan Co. v. Laimbeer*, 108 N. Y. 578, 15 N. E. 712; *Jacquin v. Buisson*, 11 How. Prac. (N. Y.) 393; *Haddock v. Grinnell Mfg. Corp.*, 109 Pa. 372, 1 Atl. 174; *Briar Hill C. & I. Co. v. Atlas Works*, 146 Pa. 290, 23 Atl. 326; *Andrews v. Schott*, 10 Pa. 47; *Richardson v. Hogg*, 38 Pa. 155; *Vandike v. Roskam*, 67 Pa. 330; *Maloney v. Bruce*, 94 Pa. 249; *Elliot v. Himrod*, 108 Pa. 579; *Hite Natural Gas Co.'s Appeal*, 118 Pa. 436, 12 Atl. 267; *Hill v. Stetler*, 127 Pa. 145, 13 Atl. 306, 17 Atl. 387; *Vanhorn v. Corcoran*, 127 Pa. 255, 18 Atl. 16; *Sheble v. Strong*, 128 Pa. 315, 18 Atl. 397; *In re Gibbs' Estate*, 157 Pa. 59, 28 Atl. 1023; *In re Merrill*, 12 Blatchf. 224, Fed. Cas. No. 9,467; *Spencer Optical Mfg. Co. v. Johnson*, 53 S. C. 533, 31 S. E. 392. But compare *Tracy v. Tuffy*, 134 U. S. 206, *Burdick's Cases*, 647; *Staver & Abbott Mfg. Co. v. Blake*, 111 Mich. 282, 69 N. W. 508; *Alleghany Nat. Bank v. Bailey*, 147 Pa. 111, 23 Atl. 439. Statutes providing for the formation of limited partnerships should receive a reasonable construction, and not such as to make its formation almost impossible. *Manhattan Co. v. Laimbeer*, 108 N. Y. 582, 15 N. E. 712. Where the parties agreed to create a limited partnership, and conducted their business as such, each is estopped as against the other to say that there never was a complete formation of such partnership, because the statutory requirements were not literally complied with. *Casola v. Kugelman*, 33 App. Div. 428, 54 N. Y. Supp. 89; *Ussery v. Crusman* (Tenn. Ch.), 47 S. W. 567.

¹⁶ *Blumenthal v. Whitaker*, 170 Pa. 309, 33 Atl. 103.

¹⁷ *McGehee v. Powell*, 8 Ala. 327.

tion is not necessary.¹⁸ The partnership may be renewed by certificate acknowledged, recorded, and published in the manner required for the original formation. If the business is continued without renewal, the partnership is a general, and not a limited, partnership.¹⁹

¹⁸ *Haggerty v. Taylor*, 10 Paige (N. Y.) 261; *Marshall v. Lambeth*, 7 Rob. (La.) 471; *Tilge v. Brooks*, 124 Pa. 178, 16 Atl. 746.

¹⁹ *Columbia Bank v. Berolzheimer*, 33 App. Div. 235, 53 N. Y. Supp. 417; *Fifth Ave. Bank v. Colgate*, 120 N. Y. 381, 24 N. E. 799; *Fourth St. Nat. Bank v. Whitaker*, 170 Pa. 297, 33 Atl. 100, *Burdick's Cases*, 655; *Hogan v. Hadzsits*, 113 Mich. 568, 71 N. W. 1092, *Burdick's Cases*, 660; *Arnold v. Danziger*, 30 Fed. 898.

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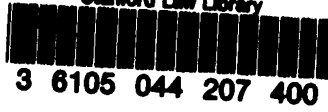
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